Sharing rules that work

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Sharing rules that work: Developing law as practical and concrete guidelines for fair sharing

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For Gabriël

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1 Introduction

1.1 Legal information that helps determine concrete reasonable amounts

The Kibera slum in Nairobi is one of the biggest in the world. Estimations of the number of inhabitants range from 170.000 up to 1 million people living on one square mile. One thing is certain: the population is highly dense.

People who visit Kibera will probably first notice the open sewage system. Its penetrating odour, mixed with the smell of the abundant heaps of garbage, is inescapable. This is what photos and video footage do not tell. After one of the frequent rainfalls, the unpaved roads merge with waste of all sorts and turn into a messy mud pool. A trail of mud meanders across the small, tin roof shacks. These small houses provide a home to many families.

In this place, people can come home one day and find all their belongings out on the street. Their lock on the front door replaced, or the roof removed from their house. This is a common way for landlords to give notice in Kibera. This is how people know they have to go and find another place to live.

The odds of the extremely poor people who live here ever getting assisted by a lawyer are small. Despite the fact that there are some legal aid organizations that work here, there are too many people experiencing too many problems. There are too few lawyers to assist them and too little resources to facilitate them. For a few years, however, there have been community paralegals in Kibera, consisting of local men and women selected on the basis of their good standing. These paralegals are also the fixers, the people who get things done.

Bob has been a paralegal for more than three years now and was trained by Kituo Cha Sheria (Kenya's oldest legal aid organization). He knows the basics of the law and the basic structure of the legal system. Bob knows which courts can help people with which problems. But, like most people all over the world, Bob and his colleague paralegals solve most legal problems among themselves.

The people who come to Bob for advice and assistance with their legal problems have the same kinds of the problems that are most frequent all over the world. These are usually disputes within families over issues like maintenance payments or inheritance, between neighbours over plots of land, with landlords over increases of rent, or with employers when they are dismissed. Bob especially enjoys the training in dispute resolution skills he occasionally receives (when there is funding, of course).

Paralegals like Bob would like to have increased access to legal information, such as what their clients are entitled to and how they can get it. This kind of information would help the paralegals tell the people who come to them for help what they can reasonably expect, what they can do to get what they want, and

where they can go for further support. The only materials they have are printed resources with basic information they received during their training (the text of the Constitution, the most important acts and laws, the structure of the Kenyan courts system, human rights documents, etc.).

Although important for creating basic awareness, the provided legal information is not actionable. It might inform them that under the 2010 Kenyan Constitution, women have a right to maintenance money for their children in case of separation, also for children born out of wedlock. But knowing this right does not help Bob to objectively establish a fair amount of maintenance money. Similarly, he might have learned that increasing the rent is not allowed without actual improvements of the house. This, however, does not tell them which improvements can reasonably result in which increases.

Bob and the other paralegals in Kibera are not the only ones to experience difficulties determining concrete amounts. For people all across the globe, it is difficult to find information about what can be fair outcomes to distributive issues. Growing up, people learn how difficult this can be when they bargain with their siblings and classmates to agree on an allotted time to play with their favourite toys, or when they hassle their parents over the amount of pocket money they should receive. Later, they will bargain over the salary of their first job and the price of their first car and house.

At some stage in their lives, people are bound to deal with distributive issues that are part of a serious legal problem that occurs in a relationship with another person or organisation. For instance, divorcing couples have to divide a house and other properties, debts, time with the children, the costs of taking care of them, etc. After a road accident resulting in personal injury, there is a need to establish the amount of damages and to allocate a percentage to each of the persons involved. Consumers and sellers look for ways to split the costs of reparation fairly when a television becomes defective three months after the warranty period expired.

Sometimes there are sharing rules to help them with this: *practical guidelines for fair sharing that are generally applicable and directly result in concrete outcomes*. Sharing rules are *practical* because they specify abstract terms like "fair" and "reasonable". The Russian Family Code provides a good example of a sharing rule for determining child support. It has clear percentages that help in doing this: 25% of net monthly income for one child; 33% of net monthly income for two children; and 50% of net monthly income for three or more children. This gives a clear and concrete indication of what a fair amount looks like. The same is true for determining compensation in case of dismissal. In many countries this is calculated on the basis of a straightforward formula that states compensation in principle can be determined by taking one month of gross salary per year worked. Often, there is a list of circumstances that can make the amount higher or lower. For inheritance issues, many countries also have very clear rules that indicate what share each family member gets.

Sharing rules are *generally applicable*, so they can be used for the most common issues and sets of circumstances. This means a sharing rule for determining severance payment might give an answer to what a reasonable amount of severance payment looks like for a taxi driver who worked for a company for six years, and also for a salary administrator who was dismissed after four years. But it might not provide an answer for a software developer who spent much of his own time in the last year getting training in software that can only be used by the organisation that dismissed him. Exceptional cases probably require a different sharing rule.

What sharing rules have in common is that they indicate *concrete amounts*. This can be amounts of money to be received or paid (damages compensation in case of personal injury, contribution to costs of living, etc.), amounts of time that are invested (time spent with the children after divorce, etc.), or tasks to be performed (division of work and responsibilities between business partners, or maintenance of trees that are on the border between two neighbours).

This study limits itself to sharing rules for distributive issues that are governed by private law, but the concept of sharing rules is relevant for a broad area of issues. Thus the argument for sharing rules probably can be extended to other domains as well, as some good examples from practice suggest.

Disputes between individuals:

- Child support guidelines that give percentages for establishing the amount of child support. In Russia, for example, percentages are set at 25% of net income for one child, 33% for two children and 50% for three or more children).

Disputes between government and individuals:

- Sharing rules for determining fair compensation in resettlement and expropriation cases. In India, there is concrete guidance on how to exactly establish a fair compensation that takes into account the land value created by the new user of the land, objective criteria for determining compensation for costs like moving, loss of income and employment, etc.

Disputes between a business and individuals:

- Guidelines that show how much compensation airline companies have to pay to consumers in case of delay or cancellation of flights in the EU.

Disputes between businesses:

- Rules of thumb with clear objective criteria that give guidance to determining a reasonable period of notice in case of long-term agreements between businesses. In the Netherlands, academics suggested formulas derived from case law that help to establish the period of notice as a function of the contractual period, objective criteria to establish time needed to adjust to a new situation, relation-specific investments, etc.

Mass claims resulting from events or products:

- Guidelines that are developed after an event took place that resulted in mass claims. In the US, after the 9/11 events, as part of the 9/11 Victims Compensation Fund, development of guidelines for compensating victims took place. One example is a guideline that provides objective criteria for establishing economic loss as a result of the events. It shows how assumed compensable income, workforce participation, earnings growth rates, personal expenditures and consumption, etc., can be concretely and objectively established.

Crimes:

- Sentencing guidelines with clear and concrete criteria can be found all over the world. For example, for death by driving caused under the influence of drugs or alcohol, guidelines provide weighted criteria for the drivers' past behaviour, criteria to establish seriousness, level of culpability, degree of carelessness (levels of alcohol or drugs), matters of personal mitigation and additional aggravating and mitigating factors.

For many issues, however, there are no sharing rules. Several countries do not have practical and straightforward tables that people can use to determine a fair amount of child support. Concrete guidelines that help buyers and sellers of goods to find reasonable middle ground also are scarce. Land disputes are very abundant in many parts of the world, but good rules for fair sharing of value between forcefully evicted settlers and project developers are less so.

Without concrete objective criteria that help to determine outcomes of distributive issues, settling can be tough. If there is no neutral guidance that helps to narrow down the bargaining range it is difficult to agree on an amount that both parties can accept as reasonable. Lack of clear guidance creates uncertainty among disputants who may wonder: is this offer of the other party fair, or am I settling for too little? Even the legal advice of a professional or the final decision from a judge in court may be difficult to assess. Without a clear frame of reference, disputants face uncertainty when it comes to evaluating the reasonableness of amounts offered, suggested, or decided upon. This can result in lengthy, costly and complicated bargaining since without clear anchors in the bargaining space, maybe anything goes.

Bargaining research also shows how challenging it is for disputants to find a fair, mutually acceptable outcome when there are no objective criteria to guide them. It is rewarding to make extreme offers and be patient. And more powerful parties, or the one with more attractive alternatives benefit from this (Korobkin & Doherty, 2009; Muthoo, 1999). So the process of resolving a dispute easily becomes a haggling process that is costly and can result in a stalemate.

Thus, in this study, I take the perspective of disputants and assume they have a (perhaps implicit) need for sharing rules when they have to deal with distributive issues. As will become clear, when sharing rules are available, disputants seem to be using them to determine what to ask for in negotiations, or in court, and to

evaluate offers from their counterpart. Judges and other neutral decision makers also seem to apply them in their decisions if they are there. Sometimes, individual judges or commissions of judges develop sharing rules that are widely used in practice.

Sharing rules could also support facilitators like the paralegals in Kibera and the many other people who provide legal assistance. There are many such facilitators working across the globe who have not received an extensive and costly legal education nor are trained to abstract from general principles to a concrete outcome and have very little legal information to consult. For them, sharing rules also can be the actionable information that helps them to determine what a fair and reasonable outcome that they work towards can look like.

1.2 Studies on reference points for determining fair shares

There is not much research on sharing rules. From the literature, it seems there has been little systematic research to how they work and can be developed. So little is known about what makes them more effective. And there is every reason to explore how sharing rules can be developed systematically.

Bargaining research indicates how people negotiate about distributive issues. It comes down to a process of haggling to identify an outcome on the range between the reservation points of the disputants (the so-called bargaining range) that both can agree upon. In bargaining literature, some studies focus on the internal standards for fairness that bargainers seem to use when they divide, i.e., the internalised criteria people use to assess the fairness of a distribution. These standards inform the bargaining range of disputants. This literature, thus, examines how notions of fairness affect sharing behaviour (Konow, 2003; Alewel et al. 2007). Studies typically use dictator games and ultimatum games for this. In dictator games, subjects can divide value (for example: $10) among themselves and another — fictitious — person. The counterpart has no say and cannot reject the division that the dictator made. These types of studies found that people are guided by (internalised) principles of distributive justice and do not act merely rationally. The latter would result in dictators keeping the entire value for themselves. But even when they can divide as a dictator they tend to give the other party a share (Pillutla & Murnighan, 1995). So people seem to have a general notion of fairness, which generally causes outcomes that are not randomly spread over the bargaining range. But the practice of dispute resolution shows there is a spread, suggesting that bargaining attitude and tactics matter, or perhaps the nature of legal advice someone has or which judge sits on the bench. Sharing rules are also standards for evaluating fairness. The difference is that they are external and neutral. They also provide more direct guidance as they indicate concrete amounts. There is surprisingly little known about how sharing rules affirm these internal standards for fairness. So we do not know what the impact on sharing behaviour actually is.

Internal notions of fairness prevent bargaining outcomes from being randomly distributed over bargaining ranges but to cluster towards the middle as people are — to some extent — willing to let the other party get a fair share as well. Studies by cognitive psychologists have extensively examined the cognitive barriers in bargaining that work in the other direction, which might reduce this willingness. These studies found cognitive barriers that impact on the behaviour and can be an impediment to reaching an agreement on fair and reasonable outcomes of distributive issues. For example, people tend to be subject to a self-serving bias. They interpret facts in their favour and unconsciously ignore unfavourable circumstances and interpretations. So they end up being too optimistic about their own position (Babcock & Loewenstein, 1997). Disputants are also affected by what is called reactive devaluation, i.e., thinking that if something is good for the other party, it cannot be good for them (Korobkin & Guthrie, 2003; Ross, 1993). Obviously, this poses serious challenges to reaching an agreement on fair outcomes. It is difficult to reach a fair and reasonable distribution of value if there is scepticism towards the other party when they make an offer. Another barrier that this literature found is the anchoring effect: first offers made tend to have an impact on the outcomes obtained in bargaining (Enough & Mussweiler, 2006; Tversky & Kanheman, 1974). This makes extreme offers (offers that are very high or very low) rewarding. The question rises whether sharing rules, by providing a neutral anchor point, can reduce the negative effect of these cognitive barriers. The research literature is surprisingly thin when it comes to this issue.

In negotiation research, sharing rules are a neglected topic as well. In a minority of the treatises on negotiation, sharing rules are mentioned as objective criteria. One leading non-academic book by Harvard researchers recommends that negotiators look for objective criteria when they are dealing with distributive issues (Fisher, Ury, & Patton, 2011). Outcomes can then be more objectively determined and do not become a matter of willpower. Others also stress the use of external standards and norms (Shell & Shell, 2000), or examples among the outcomes of similar negotiations by others (Richardson, 2007). However, there is almost no empirical research on the way sharing rules work and negotiation theorists seem to take the availability of sharing rules for granted. The literature provides some examples of objective criteria and sometimes gives some suggestions as to where to look for them. Maybe these theorists assume that the legal system generously delivers sharing rules. In reality, sharing rules seem to be less abundantly available. So the questions that arise are: how can they be made available, and what properties make them more suitable as objective criteria in settling distributive issues?

1.3 This study

The current body of knowledge about bargaining and negotiation suggests that sharing rules can be powerful tools for resolving disputes. Sharing rules provide objective criteria that bring a neutral point of reference when disputants try to

reach an agreement on distributive issues. As such, sharing rules might help disputants to overcome their cognitive barriers. No study thus far has examined how sharing rules can help to establish fair shares by providing neutral information. Furthermore, knowledge about characteristics of effective sharing rules is not available either.

To my knowledge, this study is one of the few to focus on sharing rules as a unit of analysis. Some studies focus on how sharing rules work. But these usually restrict themselves to a specific domain like sentencing guidelines or guidelines for child support work (Albonetti, 1997; Nagel & Schulhofer, 1992; Venohr & Griffith, 2005). Other studies examine the effects of specific sharing rules on judgements (Anderson, Kling, & Stith, 1999). This study goes one step further by taking the concept of sharing rules as the central topic. It examines what determines the effectiveness of sharing rules and explores how sharing rules can be developed.

One recent study describes a development process of calculation norms for child support in The Netherlands (Dijksterhuis 2008). Dutch family law grants judges much discretionary power when it comes to determining amounts of child support. A working group of judges developed child support calculation norms. These types of bottom-up developed sharing rules seem widely used once they are developed, despite these possible shortcomings. Judges apply them to the cases in their court. Disputants try to use them to inform themselves about what a fair and reasonable outcome can look like. Professionals that assist them do so as well. This study identified some weaknesses of the current work process of this working group. This process is not so much systematic. Rather, it pragmatically looks for a majority vote on a per issue basis. Due to this work process, the sharing rules produced may not sufficiently consider the needs of different groups of users and may reflect judges' preferences but not societal preferences. In addition, the results may be unbalanced, biased and difficult for disputants to understand and thus not accessible (Dijksterhuis 2008). This suggests that a more systematic development process with clear terms of reference for the sharing rules can help to improve the practice of sharing rules development.

In this study, I bring together the different pieces of knowledge about how sharing rules can work. I combine these different perspectives on sharing rules to answer the central question in this study:

How can rulemaking professionals systematically develop and deliver effective sharing rules?

I define the effectiveness of sharing rules along four criteria. First, sharing rules are defined as effective to the extent that disputants comply with them, i.e., define their offers more consistently with the sharing rule. Thus, effectiveness is a continuous issue and not a binary one. It is not a matter of effective versus ineffective but rather of more effective or less effective.

Second, sharing rules are defined as effective if they have a positive effect on the acceptability of outcomes to disputants. Acceptability is a widely used concept, which generally remains undefined. Researchers often just ask people to what degree they accept an outcome, or find a procedure acceptable. I use the perceived fairness as a proxy of acceptance. In the literature about acceptance of processes and outcomes, this is very frequently mentioned as an important determinant (Hansen, 1988; Zartman, 1976; Scanzoni & Godwin, 1990).

Third, sharing rules are defined as effective if they help to reduce the costs of settling conflicts. Costs of dispute resolution can be out of pocket expenses, such as fees for lawyers, experts, and courts, or other monetary expenses. Dispute resolution may also be a very time-consuming affair, so the opportunity costs of time have to be considered as well. Delay in solving a dispute is another source of costs. Further, in the post-negotiation phase additional costs may arise if disputants are not satisfied with the negotiated outcome. Finally, dispute resolution can be stressful, and the process of conflict management may do damage to a relationship. So sharing rules are effective if they help to reduce the time and money disputants need to invest to resolve their dispute — both during the dispute and also in the post-negotiation phase — and the stress they experience.

Fourth, and finally, sharing rules are defined as effective if they guide disputants to outcomes that are fair and reasonable. This implies that the outcomes of sharing rules are not only perceived as fair but also are fair and reasonable from a normative perspective. It is difficult to see how sharing rules that do not meet basic criteria of outcome justice are effective since they might cause exactly what sharing rules aim to cure: unreasonable outcomes to distributive issues. Theories of outcome justice tend to build on general principles and criteria. This implies that a normative evaluation of sharing rules yields results that are a matter of more or less: more fair or less fair. They are not so much a matter of fair versus unfair.

A sharing rule can be perceived as fair and acceptable but might not reduce the costs for disputants, and vice versa. Or disputants might not comply with sharing rules even though they are fair from a normative view. There might even be a trade-off between them. Instead of being a condicio sine qua non, these criteria each offer a different perspective on effectiveness. Knowledge about effectiveness along these four criteria help to determine what sharing rules we should develop. We can accordingly develop sharing rules that are as effective as possible.

A possible objection to the use of sharing rules might be that they abstract from the specific circumstances of a case. Sharing rules thus puts the importance of the circumstances of a case for finding a just and reasonable outcome into a different perspective. Lawmakers sometimes draft standards – open-ended norms that are not specific – for distributive issues. This can be seen as allocation of lawmaking authority (Schauer 2003). The abundance of less specific

standards for many private law issues (at least in a civil law country like The Netherlands) indicates that the legislator left much to the courts discretion. The communis opinio among lawyers is that specific circumstances of the real-life case are crucially important to guide judges towards the right decision. In civil law countries as well as in common law countries, thus using the decision of a single case as the platform for making law may not be a characteristic feature of the common law method, as some state (Schauer 2006). Remarkably, many sharing rules developed in practice were apparently developed in response to the lack of guidance that standards provide: formulas for determining compensation in case of dismissal, child support calculation norms, personal injury damages guidelines. Commissions of judges and experts developed these sharing rules as coordination instruments to prevent large outcome variance, or as tools to reduce the costs of dispute resolution. Hence, this study does not discuss whether sharing rules are better instruments than standards (Korobkin 2000). This study rather assumes the desirability of sharing rules, at least from the perspective of dsputants. Judges and others develop them in practice, disputants and the professionals that assist them use them and the research literature indicates sharing rules facilitate dispute resolution.

1.4 Structure of this study

To answer the central research question, I conducted six studies presented in Chapters 2–7. Each of these chapters has appeared as a separate research paper and answers a subquestion of this study. In addition to this, I acted as an academic consultant in five projects that aimed to develop sharing rules during which I could observe development of sharing rules in practice. Chapter 8 presents these observations and the challenges from these development processes. Chapter 9 presents the conclusions and implications of this study. Chapters 3 and 7 have been co-authored by Maurits Barendrecht and Chapter 4 has been co-authored by Maurits Barendrecht, Peter Kamminga and Laura Klaming. Laura Klaming, Robert Porter and Martin Gramatikov assisted with the design and analyses of the experiments from Chapter 5. Chapters 2–6 were written as separate research papers and were later bundled as part of this book.

Chapters 2–5 focus on the question: what properties of sharing rules increase their effectiveness? Chapter 2 examines the likelihood that disputants comply with a sharing rule. I evaluate the effects that information from different sources has on compliance. Social psychologists and other researchers studying compliance found that compliance is different for different types of norms. They provide insight in the type of information people tend to follow. Negotiation theorists recommend disputants review statutory law, case law, customary law, and other legal sources for sharing rules and other objective criteria. My analysis results in an indication of the effects on compliance that these different types of information have.

In Chapter 3, I examine what properties of sharing rules make them more useful as tools for disputants to solve distributive issues. Negotiation literature calls them objective criteria and mentions some desirable properties of sharing rules in the passing. I review this literature and collect the properties that are mentioned. Next, I review literature on distributive justice, fairness, negotiation, compliance, descriptive social norms, and conflict resolution. For each of these properties, I evaluate the potential effect on disputants' acceptability of outcomes and on the costs of dispute resolution according to this literature.

In Chapter 4, I develop a list of basic criteria for outcome justice. These criteria are useful for evaluating the fairness and reasonableness of outcomes suggested by sharing rules. Criteria for distributive justice seem most relevant. Other types of justice, however, might be relevant since they all indicate fairness criteria people use. For this reason, this chapter includes all generally accepted types of outcome justice. I start by listing the criteria for outcome justice that—after critical scrutiny—are regularly proposed in the literature on theories of outcome justice. Next, I review empirical literature on justice (fairness) and those criteria that people actually use are organised into outcome justice criteria.

In Chapters 2–4 I thus examine what determines the effectiveness of sharing rules. I determine the effects of different types of information on compliance, what properties increase acceptability and reduce costs for dispute resolution, and the basic criteria of outcome justice that outcomes of sharing rules should be consistent with. Chapter 5 empirically tests some of the findings. More specifically, I test the effects of transparency of sharing rules that meet the criteria developed in Chapters 2–4. I conduct two experiments with first-year law students as subjects. These experiments present scenarios that place subjects in bargaining situations. These are situations that a law student could get involved in (with a landlord, with a seller of a consumer good, etc.). In the first experiment, one group receives information about how others share in their situation and the other group does not receive any information. The experiment measures the effects of information about how others share in a similar situation. In the second experiment, one group receives a relevant sharing rule, another group receives a relevant precedent and a third group receives no additional information. The experiment measures the effects of transparency of these different types of information on the opening bids people make.

In Chapter 6, I develop a methodology for systematically developing sharing rules. I review the literature on expert knowledge and rules of thumb. There is a vast body of literature that describes how rules of thumb can be elicited, suggesting several methods. In addition to this, I reviewed legal literature for examples of case outcome overviews. Some empirical studies provide an overview of quantitative case outcomes and more general rules after systematisation. From these two types of literature, I identify and select methods for developing sharing rules. I make a costs-benefit analysis for each of these methods, using the criteria for effectiveness of sharing rules. Next, I describe a process for gradually developing better sharing rules on the basis of these

criteria. The building blocks for this process come from the domain of evidence-based practice, especially evidence-based medicine and health care. In these domains, decision rules, guidelines and other tools are part of a learning process. After they have been developed, they are gradually but systematically tested and improved. This enables practitioners, clients, and policy makers to benefit from the best available evidence (for impact on objective and subjective health as well as costs and risks) in their practice. Although no rigid process has emerged thus far, some best practices do exist. I built on these best practices.

Once sharing rules are developed, the challenge becomes to disseminate them effectively. This helps to make sharing rules transparent so that disputants have them available when they need them. Chapter 7 reviews literature on public legal education, self-helpers and self-litigants. This literature helps to describe the current state of providing the information people need when they experience a dispute. There is no framework for evaluation of effectiveness of legal information strategies, but the literature suggests some building blocks for effective strategies. Chapter 7 also evaluates the strategies of five legal aid organisations and the challenges they report so that concrete elements of effective legal information strategies can inform dissemination of sharing rules.

Chapter 8 reports on the experiences that I collected while I acted as an academic consultant in projects where sharing rules have been developed. During the course of this study, I worked on a research project that focused on developing best practices tools for legal aid providers in developing countries. Four legal aid providers that I worked with in this project showed keen interest in developing sharing rules. They asked me to act as research consultant in their projects. These organizations are the Legal Aid Board in the Netherlands, Kituo Cha Sheria in Kenya, Lawyers for Justice and Peace in Egypt, and the Institute for Research and Development Africa in Uganda. These organizations and the coutnries they work in primarily were not selected to get a representative sample of any kind, but rather reflect opportunity and availability. The selection provides a mixture of partners in developing and developed countries, with a rich network of support professionals or not, a rich tradition in informal dispute resolution or not. The projects of these organizations offered an opportunity to observe the process of developing sharing rules in practice and the challenges that had to be overcome. This chapter presents reflections on the experiences and lessons learned.

Chapter 9 summarises the results of the studies. This chapter also presents the answer to the central research question. In addition, it elaborates on the implications that this study has for different groups of stakeholders, including disputants, practitioners, judges, courts, rulemakers and innovators who want to develop effective sharing rules.

In a way, this study presents a story of rulemaking innovation. For centuries, rulemaking professionals have worked towards a system of abstract rules that is consistent with basic legal principles as well as internally consistent, elegant, and

a great tool for lawyers. This study explores how legislators, judges, academics and other rulemaking professionals can steer their efforts towards development of rules that are user-friendly, i.e. that help people to obtain fair outcomes for their disputes. Rules that provide practical guidelines that are generally applicable and directly result in concrete outcomes. So that rulemaking professionals can contribute to ending the messy processes people experience when they have to bargain and the numerous cognitive challenges they face, that the research literature so clearly outlines.

Existing sharing rules indicate that it indeed is possible to create a more user-friendly user interface of the complex system of rules that we call the legal system — at least for the most common legal problems people experience and the distributive issues that come with them. A process for systematically developing effective sharing rules could help our rulemaking professionals to provide better support to divorcing spouses when they have to settle the issues they did not ask for but still face, or the millions of consumers who seek to agree on a way to fairly share between themselves and the sellers who delivered a product or service that did not meet their reasonable expectations. Employers, victims of personal injury, business partners who end their relationship, and many others would also benefit, including Bob and his fellow paralegals, who try to cure broken relationships, under tough conditions with very limited means at their disposal.

2 The effectiveness of neutral information for resolving disputes

2.1 Sources of sharing rules

2.1.1 Legal information as neutral information

Neutral perspectives on fair sharing can help disputants when they have to establish damages, split a sum of money, divide tasks, or have to agree on some other distributive issue. Sharing rules might be effective in bringing neutrality in bargaining situations, as they can inform disputants about reasonably fair shares for each of them. The legal system is an obvious source of neutral information that sharing rules can convey. But there are other sources of neutral information that can be useful for disputants. In this chapter, I examine different types of neutral information and establish their value for disputants in a bargaining situation.

The normative value of legal information receives more attention than its value as neutral information for disputants in a bargaining situation. Roughly speaking, sources of legal information vary from human rights, treaties, constitutions at the top to case law down at the bottom. Lawyers establish a hierarchy of sources and use this hierarchy to determine the normative value of the information coming from it. They also use moral and legal theory and legal principles as complementary tools for doing this. Legal systems usually also refer to other, external sources of normative information. Examples include code and standards developed by a (business) community, common practice, and commonly shared views on what is fair and reasonable. The normative value of these types of information is relatively low as practices, customs and social norms usually are in the lower part of the hierarchy of sources of law.

The value of neutral information from these different sources might be different from the perspective of disputants facing a distributive issue. They might find the normativity of information less relevant when they look for concrete examples to guide them on how to share. Studies indicate that information about fair sharing functions as a reference point in bargaining situations. The normative character of this information probably is less relevant from the perspective of disputants. Rather, the fact that there is a reference point that indicates a fair share probably is important. Psychologists found several cognitive barriers that affect people's evaluations of offers during negotiations. Their studies found that people are prone to so-called anchoring effects (Tversky & Kahneman, 1974). The higher a first offer is, the higher the settlement probably is. Reversely, the lower a first offer is, the lower the outcome will be. The first proposals for sharing often have a big impact on an outcome, as people tend to stick to them. Regardless whether these reference points are fair or not (De Dreu, Carnevale, Emans, & van de Vliert, 1995; Kahneman, 1992; Kristensen & Gärling, 1997). This suggests that neutral

information can have a powerful steering effect on the outcomes of negotiations, whether it is normative information or not.

The perspective of neutrality brought by information about fair sharing also is helpful in itself. Studies indicate that people often suffer from a self-serving bias: they tend to be over-optimistic about their own position and unconsciously have a blind spot for circumstances that do not serve their position (Babcock & Loewenstein, 1997). Hence, people seem to easily develop expectations that are unrealistic and too optimistic about what share would be fair for them. Further, people have a tendency to negatively evaluate the ideas about fair sharing that the other party suggests. This is not so much caused by the intrinsic fairness of such ideas, but rather by the mere fact that it is the other party who suggests it (Ross, 1995). The reasoning behind this seems to be that if the other party suggests it, it is good for him. And if it is good for him, it cannot be good for me. Information that provides a neutral perspective probably helps to manage expectations and to objectively evaluate offers that are made. Despite what the normative value of this information is from a legal perspective.

In this study, I evaluate the value of different types of neutral information. Rather than focusing on the normative value of information, I follow the line suggested by cognitive psychological research and take the perspective of disputants in a bargaining situation. For them, the value of neutral information probably is determined by how useful it is for finding fair shares that both parties accept.

2.1.2 Types of neutral information

Different types of neutral information could be useful for disputants. For the purpose of this study, I define four types of neutral information that each seems useful. For each of these four categories, I indicate what their usefulness in bargaining situations is.

The perspective on information as useful neutral information instead of normative legal information broadens the scope of this study. Although sources of law are an obvious source of neutral information about fair sharing, legal codes and case law are not the only sources. As legal needs studies frequently have showed, only a small fraction of disputes ends up in the legal system (ABA, 1994; Pleasence, Balmer, & Buck, 2006; Van Velthoven & Ter Voert, 2004). Even though people might bargain in the shadow of the law, it might also imply that there are other sources of neutral information that disputants use. Private actors develop rules and regulation (like guidelines developed by commissions, academics, or other informal rulemakers) sometimes "in the shadow of government action" (Giesen & Vranken, 2004). Additionally, there might be social norms, or a firmly established practice in the context of a specific domain (like business practices). Thus, I distinguish information from the legal system (which I will refer to as "formal") from information from other than legal sources (which I will refer to as "informal").

Neutral information can show disputants "what ought" and also "what is". Substantive private law conveys information about what people ought to do, what they should refrain from and what ought to be done when things go wrong or are unclear. One assumption underlying this is that people comply with this normative information from an authoritative source. There are indications that in many social and economic situations people's perceptions and behaviour are also a function of what other people think, find, and do (Banerjee, 1992). Studies on compliance also make a distinction between normative information and descriptive information, when they examine how the conduct of people can be steered. In bargaining situations, normative as well as descriptive information provides a neutral perspective that might be useful for disputants. It is the difference between "child support ought to be 30% of the gross monthly income" and "child support usually is set at 30% of the gross monthly income". In the following, I distinguish between normative and descriptive information.

These two distinctions result in four types of neutral information that is relevant for disputants in bargaining situations. In the following, I evaluate their usefulness for disputants.

	Formal	**Informal**
Normative	Information from a source of law that shows disputants how they ought to share.	Information from another source that shows disputants how they ought to share.
Descriptive	Information from a source of law that shows disputants how people generally share.	Information from another source that shows disputants how people generally share.

2.1.3 Useful information for disputants

The concept of usefulness is problematic. It is rather broad and to some extent is subjective. Disputants might perceive it different than lawyers do. The same goes for non-cooperative disputants and disputants who seek a reasonable outcome. I define the usefulness of neutral information as the extent in which it supports disputants in finding a fair outcome. Information supports disputants when it increases the acceptance by both parties of a specific distribution, as fast as possible. Hence, neutral information is more useful when it guides disputants' behaviour of making and accepting offers in such a way that this behaviour is consistent with the neutral information. For example, if a rule indicates that child support is determined by taking 30% of the gross monthly income, the

offers that disputants make are consistent with this 30%. And that disputants accept offers of 30% of the gross monthly income.

2.1.4 Evaluation framework: studies on compliance and social norms

I review the literature from two research domains that study what type of information steers the actual decisions and behaviour of people. The first is the line of research that is developed by social psychologists that focus of different information on compliance with norms. These studies typically examine how different ways of (implicitly or explicitly) communicating a request impacts the responses of people (Cialdini & Goldstein, 2004). Or what the effects of different types of information are (Cialdini, Reno, & Kallgren, 1990). For example, researchers in this area study whether what the differences in impact in compliance are between information about what people belief is the right thing to do (normative) and about what people actually do (descriptive). The second line of research focuses on the effects of social norms on bargaining situations. These studies use bargaining experiments and assess what outcomes bargainers arrive at when there is transparency of different type of social norms (norms conveying tastes for fairness and norms conveying past behaviour), information about the behaviour of other bargainers, information about the average outcomes bargainers arrive at, etc. (Bicchieri, 2006).

2.1.5 What follows: determining sources of effective sharing rules

I review the literatures on compliance and social norms and collect indications about the impact on behaviour and decisions of the four types of neutral information (section 2.2). This helps me to establish the usefulness of these types of information for disputants. Next (section2.3), I summarise the results and discuss the implications for delivering useful neutral information to disputants.

This study contributes to the knowledge of how people can be supported to obtain a fair share. It helps to determine what type of information sharing rules can convey, so these rules support disputants when they have to divide value, damages or tasks. The results of this study contribute to the theory on objective criteria as recommended by negotiation theorists (Fisher, Ury, & Patton, 1991). In negotiation literature, there are some suggestions as to where to look for objective criteria for sharing fairly (these are as diverse as market prices, precedents, moral standards, efficiency, and professional standards). But the recommendation also received criticism as there is no clear source of these criteria (Vranken, 2006). The results of this study guide disputants, dispute resolution professionals and rulemaking professionals when to look for objective criteria or want to develop sharing rules

2.2 The relative value of neutral information

In the following sections, I discuss the usefulness of the four types of neutral information. For each of these types, I first briefly explain the type of message it conveys to disputants and provide some concrete examples. Then I discuss the indications about their usefulness that I found in the literature in the literatures on compliance and social norms.

2.2.1 Formal normative information

This is the type of information that is typically legal information. It informs disputants about what the law states that they ought to do. For distributive issues, this information indicates how disputants ought to share according to the law. For instance, the legislator may have designed a rule that grants a personal injury victim a right to full recovery of all damages sustained. This legal rule thus provides this victim the neutral information that the law states he should settle for less than full recovery. In other words, he should reject offers from the other party that are less than that. Legal codes are a typical source of this type of information, although rules conveying formal normative information are also abundantly found in case law.

Studies on compliance extensively examined the effects of normative information has on behaviour of people. The type of normative information these studies focus on is what they call "expected evaluative reactions". In other words, neutral information about what other people believe to be appropriate, i.e. think they ought to do. Formal normative information also informs disputants about expected evaluative reactions. Only not the evaluative reactions of unspecified others, but by the legal system (more concretely, a judge).

Studies indicate that the usefulness of formal normative information is a bit limited. Rational choice approaches imply that only when the risks outweigh the benefits, a person may choose to follow formal normative information. The likelihood of being detected, the certainty of a sanction when detected, and the severity of sanctions are all risk factors (Becker, 1968). The results of a Dutch study, however, put this claim into perspective. Researchers asked beneficiaries under the Invalidity Insurance Act whether they ever kept back information. Information that would lead to a reduction of the benefits they received. And whether they had moonlighted in the past year. This study found that the risk of being caught indeed seems to have impact on people's decisions about compliance. The study also showed that personal beliefs about complying with the law and the expected moral evaluations of peers were a much better predictor (Böckenholt & van der Heijden, 2007). This seems to indicate that people's decisions are affected more by the expected evaluative reactions of others than by the expected evaluative reactions of a judge. Consequently, formal normative information seems useful, but not as useful as other types of neutral information.

Some studies suggest that formal normative information can have undesired effects on the behaviour of people. Strong formal regulatory controls might send a signal to people that regulations are needed because the behaviour or preferences of "people like me" are opposite to the regulations (Cialdini, 2007). For example, one study found that tax frauds went up after the penalties for tax cheating were increased (Cialdini, 2007). There is no reason to believe that formal normative information has this kind of a boomerang effect on bargaining disputants, but this example illustrates that the value of this type of neutral information for disputants might be overestimated. The normative value of information does not mean that people are inclined to comply to it.

2.2.2 Informal normative information

Just like the prior type of information, informal normative information tells disputants what the outcomes ought to be. This type of normative information, however, communicates the type of behaviour and decisions that are approved and disapproved of by peers and other people (Cason & Mui, 1998). Social norms are a typical source of such information. But also rules of self-regulation that are developed by private rulemakers might deliver this type of neutral information. For personal injury cases, for instance, stakeholders may develop schedules, guidelines, or formulas that reflect how they think certain categories of damages ought to be calculated. Each of these examples provides disputants with different versions regarding what the outcome ought to be.

Several studies examined the effects of this kind of information on behaviour and decisions. Environmental issues like energy use (Schultz, 2007), littering (Reno, Cialdini, & Kallgren, 1993) and on marketing campaigns (Wechsler et al., 2003) are often central to this line of research. The results of these studies indicate that information about behaviour that people generally approve indeed has impact on people's individual perceptions and behaviour (Cialdini, 2007). One study found that the more relatives and friends approve of gambling, the more likely it is that people gamble frequently, spend greater amounts of money, and experience more negative consequences related to gambling (Larimer & Neighbors, 2003). In other words, the beliefs of peers impact decisions people make, also when it comes to spending money. The Dutch study on compliance with the rules of the Invalidity Insurance Act (Böckenholt & van der Heijden, 2007) also found clear indications that other people's beliefs influence individual decisions and behaviour. Informal normative information thus seems to be useful for guiding disputants to fair shares.

This usefulness, however, might be conditional. One study found that, when there is no informal sanction (like reputational damages, monetary penalties, etc.), people may act inconsistent with the information. Even when there is a clear shared belief of what the right and fair decision about sharing is (Bicchieri & Chavez, 2008). In this bargaining experiment, proposers had three different ways of sharing a fixed sum of money: a fifty-fifty split, an eighty-twenty split, or let chance (flipping a coin) select one of these. Information about what both the

proposer and the responder considered a fair division was transparent (mostly either the fifty-fifty split or the coin). When the responder had information about choice of the proposer (which the proposer knew), the proposer chose a fair division significantly more often than when the responder did not know of the coin-possibility, or did not know what option the proposer chose. In all conditions, the responder had the option to refuse, in which event none of them got anything. This implies that the presence or possibility of some form of informal sanction is needed in order for people to comply with social norms. Other studies on social norms also found this effect on behaviour and decisions of informal sanctions (Reno et al., 1993).

Informal normative information seems useful for disputants, but its usefulness might be conditional to the presence of sanctions. This type of information, however, does not provide indications of the presence and effectiveness of such sanctions as it only tells disputants what other people find to be desirable behaviour.

2.2.3 Formal descriptive information

This type of neutral information shows disputants what rules judges actually apply and what outcomes disputants obtain in court. Case law is a source where people might typically find formal descriptive information. Here, a victim of a car accident can find information about what damages were actually recovered in situations that are similar to his. Sometimes, different courts agree to apply a certain rule, guideline, or formula to cases of a certain type. For instance, guidelines for the assessment of general damages in personal injury cases may exist that provide detailed information about the nature of the compensation that courts actually reward. These are also examples of formal descriptive information as (at least in civil law countries) they do not qualify as formal law but describe court outcomes very well.

Studies on compliance found indications that expectations of what others do have strong effects on people's behaviour and decisions (Cialdini, 2007). Formal descriptive information, however, does not inform disputants what comparable others do, but rather about what a judge generally does. I found no studies that indicate there is a difference in the impact of this. However, no studies confirm that it has similar effects, neither.

Formal descriptive information can be useful for disputants when they want to determine the bottom line for their negotiations. When they know what they can expect to get in court, disputants can develop their best alternative to a negotiated agreement: BATNA (Fisher et al., 1991). Obtaining an outcome in court, however, is a costly affair. Formal descriptive information does not provide indications of these kinds of costs. This might reduce the usefulness of formal descriptive information, even though it seems to remain a useful type of information.

2.2.4 Informal descriptive information

This type of neutral information informs disputants about the outcomes people get when they settle or what kind of sharing rules others generally apply. The know-how of experienced dispute resolution professionals about how to establish fair shares is an example of descriptive normative information. Also, social norms and self-regulatory rules are examples to the extent that they are actually applied.

Studies on compliance found indications that descriptive information conveyed through social norms (social norms that refer to how other people actually behave and what decisions they actually make) have strong effects on the behaviour and decisions of people. One study found that when people received with information that others made cooperative decisions, they showed significantly higher levels of cooperation than when they did not receive this information (Parks, Sanna, & Berel, 2001). A dictator game experiment found that when information about how other dictators divide was available, subjects generally made decisions that were consistent with this information (Bicchieri & Xiao, 2007). In another ultimatum game experiment, both proposers and responders received information about average offers. This information significantly increased both the offers and the offer-specific rejection probabilities (Bohnet & Zeckhauser, 2003). This indicates that neutral information that describes the outcomes of other disputants and the way they establish these might be very useful.

It is possible that behaviour and decisions of others in a bargaining situations functions as a heuristic, a rule of thumb. Disputes can create a very unclear and complex situation. A large amount of information needs to be taken into account, some of which might be unclear. The expected moral evaluation of others, the expected outcome before a court, the costs to obtain a court decision, and many other factors have to be converted into the outcome. This creates a situation where an optimal outcome is difficult to compute and may not even exist. Descriptive information sends the message that "if a lot of people are doing this, it's probably a wise thing to do" (Cialdini, 2007). It provides disputants with information about what is likely to be adaptive and effective conduct in informal dispute resolution. As such, it may have high usefulness for disputants.

2.2.5 Summary

The literature on compliance and social norms provides indications of the usefulness of four different types of neutral information (defined along the distinctions formal – informal, and normative – descriptive). Each of these types of neutral information seems to be useful to some extent for disputants in a bargaining situation. The literature, however, implies that descriptive information might be more useful than normative information.

Formal normative information shows which conduct the legal system approves and disapproves of. This type of neutral information helps disputants to determine what a reasonable outcome is. Indirectly, formal normative information provides information about the consequences of non-compliance, as it is the information that will be enforced by courts. However, this could result in sending out mixed signals, because it can create the expectation that a certain norm exists because people behave and decide inconsistent with it. Informal normative information does not send out such a signal, since it reflects what peers approve or disapprove of. This information also seems to have impact on behaviour and decisions of people. But the effects of this kind of neutral information seem conditional. They might depend on the presence of informal sanctions. Informal normative information, however, does not provide information about the presence of informal sanctions. Formal descriptive information provides information about outcomes people generally obtain in court and about rules that courts actually apply. This type of neutral information helps disputants to determine what their bottom line can be during negotiations. However, this type of information is not complete, as it does not show what the cost of obtaining outcomes are. Informal descriptive information provides information about the outcomes that other people actually obtain from negotiations. Several studies indicate that this type of neutral information seems to be very useful for disputants, as it seems to have high impact on the behaviour and decisions of people.

2.3 Discussion and implications

2.3.1 Hierarchy of sources of law?

The question of the usefulness of different types of neutral information is related to the question of the normative value of legal information. Legal scholars have been discussing a hierarchy of information from different sources of law. This hierarchy is mostly linked to the institution that is the source of the information. The results of this study are useful to explore a different perspective on this issue.

One issue this study did not discuss is how the four types of neutral information relate to one another. What is their relative usefulness? Some findings may contribute to establishing such a hierarchy of neutral information. An ultimatum game experiment found that information about what other people do may be a stronger motive for behaviour than a message about what one ought to do (Bicchieri & Xiao, 2007). Other studies found that availability of both information about what other people think one ought to do and what other people actually do has a significant impact on decision-making, especially if they enforce each other (Schultz, 2007). These indications are not enough to establish a hierarchy but they do lead us to a fascinating observation.

Whereas most theories about sources of law and their position in a hierarchy in its core is about normativity, the results from this study indicate that from the

perspective of disputants, descriptive information has higher value than normative information. Similarly, whereas the discussion on a hierarchy of sources of law attributes much importance to statutory law, the literature I reviewed indicates that information from other than legal sources might be just as valuable.

Interestingly, some studies found that people tend to underestimate the effects on behaviour of descriptive information (Nolan, Schultz, Cialdini, Goldstein, & Griskevicius, 2008). Authority based on experience and authority derived from position in a hierarchy also seems to trigger different motivations for complying (Cialdini & Noah J. Goldstein, 2004). Compliance motivated by experience could be seen as mere compliance, whereas compliance motivated by position could be seen as obedience. One study found that the first type of authority positively correlates with job-satisfaction ratings while the latter type of authority negatively correlates with job satisfaction ratings (Meni Koslowsky, 2001). This suggests that if the goal of a dispute system is to satisfy its clients, it could consider expanding its rulemaking efforts from postulating standards to describing best practices.

2.3.2 Conclusion and suggestions for further research

Which type of neutral information contributes to the effectiveness of sharing rules, i.e., could sharing rules convey? In this study, I have defined and assessed four types of neutral information on the basis of literature on compliance and social norms. Each of these four types of information seems useful for disputants when they have to divide. Some types of neutral information, however, seem more useful than others. Neutral information that describes what most people (i.e. informal settlements rather court decisions) actually get might be most useful for disputants.

3 Sharing rules: facilitating dispute resolution with information about going rates of justice[1]

3.1 Sharing rules for distributive issues in disputes

Buying a used Toyota is tough. Even if the quality of the car is no problem, because Toyota's are very reliable, and the seller offers every possible guarantee, there is still the issue of the price. The quote of the seller seems to be rather high, and you know it is just a first offer in a haggling process. A process that may go on for days, is played in several rounds, and involves some tricks and tactics. Luckily, you both at least have information about the market. On the Internet, you can find the prices that other sellers ask for Toyotas of similar type, age and mileage. If you are more lucky, there is even a consumer organization that reports average selling and buying offers, and thus gives you such a reliable picture of the market that you can be pretty sure that you will pay a fair and reasonable price, that is, that you will not pay more than a few percents more than others do for similar Toyotas.

Compared to settling a dispute in the shadow of the law, buying a used car is a walk in the park. The situation you are in when you try to settle a personal injury claim, a divorce, or a problem with your neighbour, has more resemblance to the following scenario. Imagine yourself having to buy one particular Toyota from one particular seller and the seller having no option but to sell to you (economists call this a situation of bilateral monopoly). The value of the car can only be assessed by a process that costs a fortune and takes several years. Even (costly) experienced advisers are reluctant to give you a number, or tell you whether an offer is worth accepting. If they give you a ballpark figure, you have no independent way of finding out whether this is a reliable estimate. There is no public information about the value of similar cars. There are only a few extremely individualized case-descriptions of prior decisions about vehicles that have some properties in common with the car you are trying to buy (four wheels, four chairs, lights in front and in the back), but other properties are different (motor, air-conditioning, condition of paint). Both you and the seller invoke rights to a fair and reasonable solution, cite cases that lead to widely diverging outcomes, mention prices that differ by as much as 1000%, and feel lost in the process. What can help you out in such a situation?

In such circumstances most people would probably welcome information about the 'market', about the 'going rates of justice'. Knowing what compensation other people get when they suffer from permanent disability after a car accident is useful for disputants. Or how much other people that were evicted by the government receive. Sometimes there are social norms, formulas or legal rules that give disputants clear guidance on how to share gains and losses. 'Two weeks salary for each year served with the company in case of a redundancy'. 'Damages

[1] This chapter is adapted from a paper co-authored by Maurits Barendrecht.

for lost profits are assumed to be 10% of turnover'. In some countries, damages schedules for personal injury exist that have detailed guidelines and formulas for determining awards. In The Netherlands, the going rate for not wearing a helmet or a seatbelt is a 15% reduction of the damages award to which a victim of a road traffic accident is entitled.

Research results indicate that this type of information may have effects that are similar to information about market prices on the sale of a used car. It brings some neutrality in a game of offers, counteroffers and threats and guides bargainers to the same price. The first line of thought that supports this assumption is developed in negotiation theory. Negotiation theorists Fisher, Ury and Patton famously advised negotiators to look for sharing rules and other objective criteria in order to guide them. In their perspective, negotiation is a problem to be solved by the parties. This perspective is easy to apply to the value creation phase of a negotiation. During this phase, parties search for solutions that maximally serve the interests of both of them. However, Fisher et al. also try to persuade negotiators to use the perspective of joint problem solving in the distributive phase of the negotiations. During this phase, they have to split the pie. Fisher et al. recommend the parties to jointly search for objective criteria that could guide them to a share that is fair and acceptable for each. Market prices, default rules or commonly used clauses could serve as objective criteria in transactions. In conflicts, rules coming from the formal legal system can function as objective criteria. The recommendation of Fisher et al. regarding objective criteria is, in effect, the element that distinguishes their theory of Principled Negotiation most clearly from earlier work on integrative negotiation. Although their theory is widely used and much cited, this particular contribution did not attract much attention in the negotiation and conflict resolution literature.

As chapter 2 found, psychologists studying compliance tend to find that transparency and availability of norms can effectively direct behaviour. Empirical studies on norm conformity show that focusing people on an existing norm is an important step toward compliance. Both injunctive social norms (what others think one should do), and descriptive social norms (what is likely to be adaptive and effective conduct in the setting) can do this job (Cialdini et al. 1990; Cialdini, 2007). Bargaining experiments also show that salience of fairness criteria and information about compliance by others usually results in fairer sharing. In ultimatum game experiments, proposers came to more fair offers if they knew that the responder had knowledge about criteria specifying what a reasonable outcome would look like (Bicchieri & Chavez, 2007). Interestingly, these issues are not to well developed in research literature or practice of inducing norm compliance (Cialdini, 2007). A possible explanation for this neglect is that researchers just like other people might underestimate the effects of information about what others do (Nolan et al., 2008).

The third reason why I think sharing rules are an important (but underappreciated) tool for dealing with disputes is the strong analogy with

transparency of prices. Economists generally assume that transparency of prices has favourable effects, and even made it a condition for a perfect market to be efficient.

Fourth, from my research and development projects in the area of dispute system design, I often found that client groups and legal aid professionals spontaneously mentioned the availability of objective criteria as a way to improve the system. Organizations of victims of road traffic accidents, for instance, have asked for more transparency of sharing rules for damages awards, and even for publication of settlements in order to get a better feel of what I call the going rates (Van Zeeland, Kamminga & Barendrecht, 2007). I also formed the impression that dispute systems that have transparent objective criteria are more likely to perform well. In The Netherlands, for instance, both severance payments to dismissed employees and financial support for ex-partners after a divorce are calculated by using unofficial, indicative formulas designed by committees of judges. These dispute systems show very high settlement rates, and rather fast and low cost procedures in courts, whereas there is little indication of dissatisfaction among users. Making information about going rates of justice available could even be a prominent strategy to promote access to justice.

Thus, in this study I build on the results of chapter 2 and I assume that there is a (perhaps hidden) demand for information that describes how others have settled similar issues. What I am interested in is how this information can be effectively conveyed to disputants. How can disputants be informed about fair sharing so they can settle their dispute against lower costs? So I review the literature to look for properties of descriptive normative information that are possibly influencing its capacity to induce acceptance of outcomes and the costs of negotiations.

I limit myself to information that has the form of a guideline, a formula, or a rule of thumb. So information about individual settlements, or precedents, is not within the scope of this chapter. I also do not deal with the much more general class of legal and social norms that guide behaviour by describing desirable or undesirable conduct in a more or less precise way. I strictly focus on norms that give guidance on how to split the pie.

The study proceeds as follows. Section 3.2 summarizes the existing theory regarding the role of objective criteria in negotiations and the criticism it has received. Here, I start from the negotiation theory, but also link to other research traditions in which similar topics have been discussed. Section 3.3 lists and discusses nine possible properties of suitable sharing rules, based on the points brought forward by Fisher et al and others. For each of these properties, I review the existing literature and discuss how these properties may increase the acceptability of outcomes and lower the costs of dispute resolution. In particular, I link the concept of sharing rules to the results of empirical studies regarding distributive justice. Psychologists researching social justice and economists investigating the impact of fairness beliefs on behaviour have

provided ample evidence that certain criteria for distribution are more likely to be acceptable than others. Depending on context, sharing rules reflecting justice principles such as equality, equity, or need will be seen as fair (Konow, 2003a).

Section 3.4 summarizes my findings, gives an impression of the availability of suitable sharing rules, and discusses the supply of such sharing rules. This Section also explores the usefulness of the perspective of rules as "supporting disputants" for legal systems. I argue that rulemaking professionals should consider how to design rules as properly functioning sharing rules, taking into account the nine properties I discuss. In this way, rulemaking professionals can enhance the capabilities of the parties to solve their own disputes, lower the costs of dispute resolution, and increase the acceptability of outcomes.

3.2 Rules from the perspective of negotiating parties

"Getting to Yes", by Fisher et al. is arguably the most popular text in negotiation literature. Although it is not written in the format of a scientific publication, it was conceived in the setting of the Harvard Negotiation Project and has been widely cited in research texts. Interestingly, however, one of the main innovations of the book has hardly been the topic of scientific debate.

Maybe the reasons Fisher et al. gave for using sharing rules and other objective criteria were just too obvious or just too convincing (Fisher, Ury, & Patton, 2011). They tell negotiators that adhering to an external standard might be wiser than focusing on an arbitrary result: it increases the chance of benefiting from past experience. It is easier to follow an independent standard than to give in to the other side's positional demand. Basing a settlement on an external standard is likely to diminish the chance that a person will regret the settlement later. Building on this, an obvious way out for distributive issues is to look for sharing rules that other people have used to settle similar issues. Finally, according to Fisher et al., looking for sharing rules and other objective criteria is the only real alternative for solving the distributive issues by what comes down to a contest of willpower, a contest that endangers relationships and can be time and money consuming.

Later, other writers gave additional reasons to use sharing rules to determine how to divide. One is that people have a deep need to be seen as consistent and rational in the way they make decisions. Another is that they have a tendency to defer to authority (Shell & Shell, 2000). Social psychologists and economists found empirical evidence that people also place a positive value on treating other people fairly (Korobkin, 2000). Disputants may consider sharing rules as a proxy for the agreement between other people in similar situations and use them for external social comparison. Being treated similar to others is an often confirmed component of people's well being (Korobkin, 2000). It has a strong effect on perceived fairness and level of satisfaction (Klein & Moore, 2005), both of which positively affect the probability that negotiators follow through on an

agreement (Barry & Oliver, 1996). Moreover, when external standards are available, the effects on satisfaction of self-interested utility maximization (evaluating the outcome as such) (Gillespie, Brett, & Weingart, 2000), expectancy disconfirmation (evaluating the possible outcome with outcome expected prior to negotiations) (Oliver, Balakrishnan, & Barry, 1994), and social utility (evaluating the possible outcome with that of the negotiating counterpart) (Blount & Bazerman, 1996) might be reduced.

The recommendation to use sharing rules has been taken on by critics of the problem-solving approach (Funken, 2001; R. Korobkin, 2000). However, most of their criticism seems to be practical, rather than fundamental. They argue that the parties will only bring forward sharing rules and other objective criteria that support their positions. According to them, sharing rules are often difficult to distinguish from arguments supporting a position. In a legal dispute, for instance, both parties will interpret the facts and find case law that supports a claim or defence that would lead to a maximum outcome. Each party selects criteria that best suit its position. Going back to the situation of a car sale, this is not unlike the mentioning of an extremely low or high price that was once paid for a similar car. Such references to rather extreme criteria are indeed unlikely to bring more neutrality in the negotiations and they are more like arguments that support positions. But usually there are also more neutral criteria that parties, as well as neutrals, may suggest as possibly useful, and that are not the mere translation of a position. Suggesting sharing rules can be particularly effective when they reflect values the parties have. If a person tends to think in terms of efficiency or of rewarding effort, sharing rules based on these principles are likely to appeal to him, as this study will show (Shell, 1999).

Sharing rules and objective criteria are not a hot topic in negotiation theory. Providing neutral information about fair sharing is a neglected issue in debates about dispute resolution (Guthrie, 2000). Handbooks regarding conflict resolution do not treat the topic extensively. Some of them mention it in passing, for instance in chapters devoted to third party intervention. Conflict research tends to concentrate on the ways dispute resolution procedures create value and overcome barriers to dispute resolution. The legal system and the rules it provides are taken for granted and are not object of study. At most, legal rules are mentioned for influencing negotiations about disputes, directly as objective criteria, and indirectly as determinants of a BATNA that have the form of a court action.

The way rules guide outcomes is also hardly an issue in psychological research regarding conflict and negotiation. One possible explanation for this (that researchers tend to underestimate the influence of descriptive normative information on behaviour) has already been discussed, but there may be more. Possibly, researchers see rules as belonging to the realm of law and lawyers, and outside their own area of expertise. Another reason may be the apparent complexity of applying rules to disputes. Often, many different issues arise in one conflict, and complex rules have to be applied to each issue in order to

obtain an outcome. In legal research, rules are mostly studied from the perspective of a judge who applies them to facts. The literature about "jurisprudence," the art of applying rules to real life situations, is vast. How rules influence negotiations between disputants is another matter, though, which is hardly studied at all. Socio-legal research has noticed that negotiations about disputes take place in the shadow of the law, but has not made much progress in determining how this shadow affects negotiations (Madoff, 2002; Mnookin & Kornhauser, 1978).

Dispute resolution theorists have, incidentally, developed procedures that try to deal with this complexity, procedures that have similar advantages as the use of sharing rules. They sometimes recommend the use of joint decision trees. First, let the parties discuss which issues have to be decided. Then, let them assess the odds for each issue (Aaron, 1995; Mnookin, Peppet, & Tulumello, 2000; Raiffa, Richardson, & Metcalfe, 2002). It is interesting to note how this procedure also invites negotiators to adhere to an external standard that benefits from past experience, strives for an independent standard, and answers the need to be seen as consistent and rational. Moreover, in this procedure the disputants will need to assess the odds for each issue. When they want to do this in an objective and problem-solving mode, searching for sharing rules will again be a helpful way out.

3.3 Sharing rules: desirable characteristics

When suggesting that negotiators use objective criteria, Fisher et al. made some useful remarks on what type of criteria to look for. Their recommendations are cursory, but – as every word in the book – very to the point and well considered.

In this section, I discuss these recommendations one by one and discuss them as possible properties of sharing rules. These properties are held to be desirable if they have a positive effect on the acceptability for parties of possible outcomes. Acceptance is a widely used concept, which generally remains undefined. Researchers often just ask people to what degree they accept an outcome, or find a procedure acceptable. In the literature about acceptance of processes and outcomes, perceived fairness very frequently is mentioned as an important determinant (Scanzoni & Godwin, 1990). I evaluate what the effects the properties have on fairness perceptions of disputants.

Further, I discuss how these recommendations can reduce the costs of settling conflicts. Costs of dispute resolution can be out of pocket expenses, such as fees of lawyers, experts, courts, or other monetary expenses. Dispute resolution may also be a very time consuming affair, so the opportunity costs of time have to be considered as well. Delay in solving a dispute is another source of cost. Further, in the post-negotiation phase additional costs may arise when disputants afterwards are not satisfied with the negotiated outcome. Finally, dispute

resolution may be stressful and the process of conflict management may do damage to a relationship.

3.3.1 Independent of will power

The more objective the better, say Fisher et al., when they recommend negotiators to use criteria that are "independent of will power" (Fisher et al., 2011). This is a valuable recommendation, but how to apply it in the setting of a dispute? In the context of disputes, perceptions of what is a fair outcome are often self-serving (Babcock & Loewenstein, 1997). This happens in particular in negative relationships where the parties have started to dislike each other (Drolet, Larrick, & Morris, 1998).

It may be possible to rank criteria according to the likelihood of leading to self-serving interpretations. Babcock and Loewenstein state that self-serving biases tend to occur if there is some form of asymmetry in how the negotiation environment is viewed. For instance, this unevenness may be caused by different non-agreement values or costs of non-settlement, or subtle differences in roles (Babcock & Loewenstein, 1997). This points in the direction of sharing rules that are applicable to both parties, a property I will discuss later. Furthermore, sharing rules linked to facts that can be established objectively will be preferable, not only in order to save costs, but also to diminish self-serving biases. Such sharing rules give more clear guidance to disputants.

In protracted disputes, there is often some damage that has to be borne by one of the parties, or shared between them. Equity, that is division on the basis on what one deserves according to input ratio, can then take different forms. Legal rules may, for instance, refer to intent, blameworthiness, fault, negligence, contribution, sphere of control (in situations of strict liability), or mere causation. Some of those criteria seem to be more susceptible to self-serving biases than others. Intent and blameworthiness are easily attributed to others, but people do not particularly like these attributions, and tend to become defensive.

This may be different for other principles, such as contribution (Stone, Patton, & Heen, 1999). Here, the moral disapproval that comes with blame is absent. Secondly, the discussion is more likely to be two-sided. 'What did both parties contribute?' instead of 'Who is responsible?' Thirdly, the focus is on the system, that is, on the interaction. The roles of the individuals matter, but are not the first focus. There may also be neutral contributions.

This does not prove the point of Fisher et al. that acceptable outcomes are more likely if the objective criteria are more independent of will power. But there is much to say for this hypothesis, and it seems rather easy to test it. As to the process of dispute resolution, it seems likely that criteria that invite self-serving biases may easily lead to additional conflict, and thus also to higher costs of dispute resolution.

3.3.2 Legitimacy

Sharing rules can provide legitimacy, say Fisher et al. Legitimacy can mean different things. It can refer to the source of the sharing rule: official acknowledgement by the legal system, for instance, or acceptance by a group to which the parties belong. Sharing rules may also be legitimate, however, because they reflect certain principles with inherent qualities to disputants (Welsh, 2003).

There is a range of research that confirms that people care for particular standards of fairness, and, arguably, will thus see them as more legitimate than others. To begin with, many people appear to be more neutral in their perceptions of fairness than the standard "rational choice" model with purely selfish preferences predicts. Economists have found that anonymously interacting agents frequently agree on rather egalitarian outcomes in bilateral bargaining situations (Bolton & Ockenfels, 2000; Camerer & Thaler, 1995; Falk, Fehr, & Fischbacher, 2003; Fehr & Schmidt, 1999; Güth, Schmittberger, & Schwarze, 1982; Roth, 1995). When one party has the power to distribute value between itself and the other party, she will normally not maximize her own outcome, but 'give' a fair share to the other party as well. In ultimatum games, and even in dictator games, people with power to split the pie give around one third to the other party on average. This means that many people split by half, and only a small minority keeps all to itself.[2]

An important caveat is that the perceived fairness of the intention of the other party is also relevant (Fehr & Fischbacher, 2003; Rabin, 1993). If the other party signals bad intention, the share it will receive will be lower. People dislike being the target of unfair behaviour (Pillutla & Murnighan, 2003). Unfortunately, in disputes they often perceive the other party as the one who has treated them unfairly. People are also biased. They take more responsibility for a joint outcome than is their due and see themselves as better than others (Taylor & Brown, 1988). This is especially true in ambiguous situations (Baron, 2001). In sum, people basically want to share fairly, but they do not mind taking somewhat more of the pie if they have power, their inclination to split fairly can be spoiled by bad intent of the other party, and they will perceive more bad intent than is realistic.

What type of fairness criteria do people adhere to in which type of situation? Social justice theory distinguishes between criteria based on equity concerns (according to contribution, input or effort), equality or need. Most early studies assumed that equality would be the preferred allocation rule when social

[2] This is what experimental research in ultimatum games and dictator games learn us. In an ultimatum game, the first player proposes a certain distribution of value. If the second player rejects this proposition, neither player gets anything. If he accepts, the value is distributed as proposed. Dictator games are similar, with the difference that the first player exclusively determines the distribution. The second player cannot reject, but only passively receives according to the first players' decision.

harmony is the goal; that is in relationships (Deutsch, 1975; Sondak, Neale, & Pinkley, 1995). Indeed, many studies found that even high contributors tended to prefer equal sharing when they expected future interactions. Low contributors preferred equity in some studies (Shapiro, 1975; Sondak et al., 1995), and demanded an equal share in others (Austin, 1980). Once in a relationship, equal sharing thus becomes the predominant norm (Sondak et al., 1995). So in relationships, sharing rules that reflect equality will tend to have legitimacy, even if the contributions are not exactly equal. One of the reasons equality may be preferred, is that the context makes "first best" justice to complex or to thorny (Konow, 2003a).

Sharing according to contributions seems to be more acceptable when people are strangers. In particular in situations where resources are constrained, strangers tend to demand shares according to their contribution. For them, equality seems to be a luxury (Sondak et al., 1995). But what is a contribution? Recent research confirms that effort and individual choice are among factors that determine what people are deemed to deserve, but that factors to be disregarded are birth, brute luck, and choices that do not affect productivity. Allocations are thus to be made in proportion to inputs that people control (Konow, 2003a).

In family relationships, a recent study found need to be the most important criterion for distributions, followed by equality and equity (Fondacaro, Jackson, & Luescher, 2002). In relationships between strangers, need may still be an acceptable criterion if the dispute is relevant for the fulfilment of basic needs (Konow, 2003a).

Different fairness criteria will have different impact on the costs of dispute resolution. Splitting in equal shares is easy, and will not lead to disputes about effort or other variables that are difficult to observe, which may account for the popularity of equality in ongoing relationships. Dividing according to equity requires some measure for the respective contributions, which may be difficult to find. Need is sometimes more easy to establish, but it may be subject to misrepresentation in other contexts.

3.3.3 Belonging to parties

Disputants can look for sharing rules developed by others and borrow them. Fisher et al. also recommend them to choose, or even develop, their own criteria (Fisher et al., 2011). The legal system, of course, enables people to draft rules that fit their preferences. Before conflicts arise, drafters of contracts or legislation will try to listen to their constituencies and let them suggest the criteria to be implemented in the rules that will govern their relationship. They may also be tempted, however, to use boilerplate contract clauses, or rules that come from other, similar, regulations.

Once in a dispute, the parties may be invited to look for sharing rules. Mediation handbooks often describe this process (Moore, 2003). In arbitration and court procedures this is less common. Judges and arbitrators are supposed to know "the law".

The contract between the parties, of course, is the first and foremost source of the parties' own sharing rules. Sharing rules that are intrinsic to their relationship can also have normative appeal outside their intended scope of application. When two partners in a business have invested in a proportion of 40-60%, this is a criterion that may have some appeal for the distribution of a damage caused by this business as well. The rules regarding interpretation of contracts that refer the parties to custom or rules of the profession are of similar nature. Social justice research confirms that earlier transactions provide a basis for fairness judgments people often use (Konow, 2003a).

Why would sharing rules coming from the parties lead to more acceptance? One reason might be that preferences for justice are local, varying from group to group, and from country to country. The empirical evidence suggests, however, that these preferences are rather similar in different groups and countries (Konow, 2003a).

Another reason may be that people want to be consistent, which is one of the drives behind using sharing rules. If that is the case, it is not surprising that people are in particular influenced by sharing rules that they have developed themselves. But the downside of consistency as a drive is that sharing rules coming from the other party are even less appealing. Suggestions to use sharing rules coming from one side may suffer from "reactive devaluation" (Ross & Ward, 1995), although probably less so than concrete proposals. For similar reasons, the effects on dispute resolution costs of using criteria that belong to the parties do seem ambiguous.

3.3.4 Continuous

I now proceed to a recommendation that is not explicit in Fisher et al., but implied in many of their examples of sharing rules, such as market value, efficiency, costs, but also in their discussion of legitimacy. When the sharing rule are of continuous nature instead of providing binary 'yes or no' answers, they may be easier to use and considered to be more legitimate (Abramowicz, 2001; Dari-Mattiacci & De Geest, 2005; Menkel-Meadow, 1996). Continuous rules[3] give percentages, amounts, figures, degrees, points on a scale, or ranges that lead to outcomes. Private law has many examples of such criteria: rules on comparative negligence, on damages, on proportional causation (loss of a chance), on the computation of support of spouses after a divorce, or on the

[3] Strictly speaking we should distinguish between continuous, discrete and binary criteria. Discrete criteria have the advantage to better direct the parties and to incur lower costs on the parties, since the exact answer need not to be find out.

compensation due to employees in case of dismissal. Dispute resolution practice is full of continuous criteria as well. Lawyers have to think in terms of odds of prevailing on a certain issue when advising their clients and discussing disputes with opposing counsel. They have to calculate, weigh and estimate all the time.

Continuous sharing rules may make it easier to reach outcomes agreeable to both parties (compared to rules giving "yes or no" answers) because they directly lead to intermediate outcomes. They may also lead to a more favourable pattern of investments in legal costs. When the parties build their case, they will generally start with presenting the evidence and arguments that are likely to have a big impact on the outcome and are rather easy to obtain. During the negotiation and litigation process, each next dollar of investment in legal costs will generally give a lower "return on probable outcome" than the earlier ones. Under continuous sharing rules, the extra investments will not be made anymore, if the expected value of the change in outcome induced by the extra effort becomes lower than the costs of the extra effort. Under "yes or no" criteria, extra investments are valuable as long as these are likely to tip the scale in favour of the disputant making the investment. Because an extra investment may change 100% of the outcome, the arms race between the parties will generally continue longer.

Furthermore, when allocating value, people do not think in a binary way. Empirical studies on distributive justice typically show that most people distribute according to input, need, or evenly. Therefore, it can be said that if sharing rules and outcomes should be perceived as just or fair by disputants, a continuous nature might be a bare necessity.

3.3.5 Applicable to both parties

Criteria are more easily applied and appear more neutral when they encompass the interests of both parties in a similar manner. Fisher et al. suggest that negotiators look for sharing rules that are reciprocal (Fisher et al., 2011). One way of explaining this recommendation is that specific criteria should also be applicable when the other party would be in a similar position. This recommendation speaks for itself. Why would a party agree upon something the other party would not find acceptable, were he in his position? For those searching for support of this recommendation, it can easily be linked to Kant's idea to act only according to that maxim by which you can at the same time wish that it would become a universal law, the categorical imperative.

A stronger version of this recommendation is that the sharing rule is applicable to both parties in a particular dispute. Some rules weigh similar elements of the situation at both sides. In most disputes, both parties have contributed somehow and somewhat to the situation in which the parties find themselves. Rules regarding comparative negligence that refer to the way both parties causally contributed to damage are an example of objective criteria that live up to this stronger version of the recommendation to use reciprocal norms. In a contract,

the parties may agree to divide profits or pay damage according to their contribution. Division according to the hours worked for the common venture, or to the money invested therein are examples of criteria that apply likewise to both parties. In case damages have to be divided, the degree of fault, or the possibilities both parties had to prevent the damage in question could be a reciprocal criterion.

It is easy to see how the use of sharing rules that are reciprocal can contribute to acceptability of outcomes. Such rules, applied to both parties in a dispute, make the parties feel more like equal participants than rules that are only applied to one of the parties. This property of sharing rules can be linked to the 'group value' model of procedural justice (Tyler & Blader, 2000). The idea that sharing rules that are reciprocal are more acceptable is also supported by the prevalence of preferences for reciprocity (Fehr & Fischbacher, 2005). Most people think it is important to respond in kind to acts of other parties, thus rewarding kind actions and punishing unkind ones. This can be seen as a self-applied rule, which implies the idea that both parties should be treated in the same manner, under the same rules. Also, the point made above with regard to the relation between perceived fairness and a continuous nature can be repeated here. Fairness principles people actually apply always weigh similar elements on both sides.

Will sharing rules that are reciprocal save costs of dispute resolution compared to sharing rules that are only applied to one party's conduct or situation in a conflict? This does not seem to be the case. The costs of dispute resolution are more likely to be influenced by other properties of sharing rules.

3.3.6 More sharing rules or one right answer?

According to Fisher et al., no decision is needed on which sharing rule is the right one (Fisher et al., 2011). They hold that more than one rule can be applied to the problem, rendering different outcomes. Their idea is that the pattern of these outcomes can give the parties an indication of what a reasonable solution is. The parties may split the difference between the outcomes suggested by two, equally acceptable sharing rules. They may give weights to rules, or they can ask for neutral advice on what relative weights rules should have.

When discussing this property of sharing rules with people with a legal training, we are often met with disbelief. There, the prevailing idea is to first decide about the applicable norm, and then to apply it to the facts. In the practice of dispute resolution, it is rather common that more than one rule is available. Several schemes for calculating damages may coexist. Case law may provide a number of competing standards. It may be doubtful which legal rules govern the situation: that of one state or of another one; the rules provided by the system of administrative review, or the slightly different approach of the civil law courts; the rules of the contract or the default rules provided by contract law; the rules proposed by one legal scholar or another one. Much energy of the court system

is devoted to eliminating such differences. Unity of the law and equal treatment of like cases are valuable goals, we are told.

Fisher et al. suggest, however, that agreement on what the law says is not essential for reaching agreement. This is true, of course, because most disputes are settled before all legal issues are resolved.

But can their point be extended? Are there situations in which having more than one sharing rule is actually a positive thing? The process of applying different criteria to one situation has some similarities with the process by which judges weigh different factors to see how the balance strikes. Also, both parties may have different values. Consider a conflict where one party values hard work above all, and the other party thinks primarily in terms of helping the needy. Agreeing about these values may prove to be very difficult, as the history of economic policy in the 20th century shows. But applying them to a concrete conflict may not be so difficult, in particular if the needy person works hard, or the idle person is not in need of anything. Even if the sharing rules point in different directions, an outcome agreeable to both parties may be easier to reach if each can apply his own rule, fitting his own values, and then a compromise is sought between both outcomes. Deciding which value is "better", may cost more time and lead to more additional conflict.

For this reason, lawyers drafting contracts, or diplomats negotiating international agreements may prefer multiple sharing rules over a fight about rules, which will often result in leaving the issue open. Consider a clause regarding liability for damages. Both parties propose different caps on damages or types of damages that are excluded from recovery. Recognizing both their preferences, and explicitly saying in the contract that both sharing rules will have to be applied next to each other, may in some situations be preferable, in particular if a vaguely worded clause is the alternative, or the possibility of extended disputes over fault and liability. When damages are occurring, there is even a fair chance that the outcome will be the same under both their competing clauses.

Another reason for allowing more sharing rules in legal instruments is that it becomes easier to develop new sharing rules. The more a rule is used, the more acceptable it may become: it then develops into a more attractive indicator for external social comparison. I discuss this more extensively in section 3.3.9. If a rule has to be accepted as the only right rule before it can be used, the threshold for developing new sharing rules becomes rather high. Allowing multiple criteria enables experiments, and makes further development and adaptability far more likely.

3.3.7 Tailor decisions to circumstances

The method of integrative negotiations implies that the parties look for solutions that fit their interests. Fisher et al. recommend negotiators to ask questions about positions: "What's your theory?" (Fisher et al., 2011). The solution the

disputants strive for is a personalized one, not an abstract general solution, imposed by an outside intervention. This personalization takes place when the parties create value, but also when they divide the pie. In the method of Principled Negotiation, objective criteria like sharing rules are indeed tools, helping the parties to find solutions, not binding norms.

This echoes one of the prevailing developments in private law during the last century: the one towards individualizing judgments. Courts and academics alike have felt a need to make court decisions more contextual, and to take into account more different circumstances of the situation. In short, they wanted to fit the decision to the particulars of the situation. Many private lawyers, even academics that are trained to see the patterns in what they study, turned away from rule-based decision-making. Rules of private law became more open ended, often by adopting open standards referring to reasonableness, reasonable expectations, or general doctrines with an area of application that is not clearly delimited. This also was a move away from objectivity, necessary because legal rules are considered to be binding. Binding rules can only lead to personalized solutions if they are very detailed, or even infinitely detailed. Often detailed rules are costly to form and to apply, however, and they will still be incomplete. So the natural way to deal with this dilemma seemed to be to let the rules be open-ended, and do the contextualization when the rules are applied to the individual case.

Yet, another answer to this dilemma is possible. Instead of binding rules, law makers can create rules that are presumably binding (Schauer, 1991). This can be achieved by offering guidelines, schedules, calculation schemes, or rules that have to be applied in principle, but are open to contextualization by way of an escape such as a hardship clause. And creating rules that hold presumptions is what designers of contracts and legislation often do.

Contextualization is likely to enhance the acceptability of outcomes, because outcomes will more closely fit the interests of the parties. Sharing rules that leave room for contextualization are less likely to be seen as imposed from above, or by the party who proposes them.

Whether contextualization will diminish the costs of dispute resolution is another matter. Obviously, the possibility to deviate from a rule because of specific circumstances may become a costly issue to dispute about itself. On the other hand, applying hard and fast rules may be cheap, but the fight is likely to move to issues relating to the choice of the rule that has to be applied. These side issues can be very difficult to resolve. Moreover, and as we have argued, the alternative to presumptive rules is probably not hard and fast rules, but very open-ended and general rules, that may be even more costly to apply.

3.3.8 Practical

Then, sharing rules should be practical (Fisher et al., 2011). Some rules are easy to apply, such as notice periods or severance payments that are calculated on the basis of the duration of an agreement. Others may require intensive fact-finding. If the speed of a car just before the accident is relevant for liability, for instance, this is generally more costly to investigate than, say, the weight of that car.

Practicality of sharing rules can mean different things. A possible translation is: applicable against low costs. The costs of dispute resolution, in particular legal costs, are a general concern, but there are not many theories regarding the causes of these costs. Costs of fact-finding (discovery, hearing witnesses, letting experts do inquiries) are certainly among the major causes of high legal costs, however. Fact-finding costs are related to the norms that have to be applied. Some norms require more information than others, and some information can be acquired against lower costs than other information.

Developers of sharing rules can manage these information costs. This can be done either by using rules that require little information, or by taking care that this information is collected efficiently. If, for instance, the hours worked is the criterion, a good registration seems indispensable.

3.3.9 Reflect practice and provide information about the actual use

Finally, I discuss another property that is not explicitly recommended by Fisher et al, but results from chapter 2. Additionally, it follows from their statement that using sharing rules is a wise thing to do because it increases the chance of benefiting from past experience (Fisher et al., 2011). This requires that sharing rules not only provide information about how the pie should be divided, but also provide social information. Sharing rules that are actually applied and of which it is transparent that they are, are most supportive to disputants.

Behavioural economic literature tells us that people tend to compare the outcomes of negotiations to a reference point (Kahneman, 1992). Negotiators often use other people's outcomes as such a reference point (Bazerman, Schroth, Shah, & Diekmann, 1994). As stated earlier, sharing rules get more acceptable when they develop into a more attractive reference point by being more frequently used. Therefore, sharing rules, ideally, provide information that shows that they reflect what other people actually do. If they provide such social information, parties are enabled to compare themselves with others in similar situations.

Empirical expectations (what we expect others to do) and normative expectations (what we believe others think ought to be done) are the two different expectations that according to psychologists studying compliance affect compliance with norms (Bicchieri, 2006). Therefore, they distinguish descriptive social norms from injunctive social norms. Whereas injunctive social norms mobilize people into action via social evaluation (what others think one should

do), descriptive social norms move them to act via social information – in particular, social information about what is likely to be adaptive and effective conduct in the setting. Descriptive social norms send the message "If a lot of people are doing this, it's probably a wise thing to do". There is increasing evidence that descriptive social norms direct behaviour forcefully and even have stronger effects on compliance than injunctive social norms (Cialdini, 2007; Bicchieri & Xiao, 2007).

Further, research on heuristics indicates that social comparison is widely used to avoid costs by putting trust in a search method that worked in the past for a similar problem (Marsh, 2002). People have limited computational abilities, limited access to information, and – very important – limited resources available. In most real life situations, finding optimal solutions may either take too much computation, or they may not even exist. Rather simple cognitive mechanisms by which humans make decisions (such as social comparison) both work surprisingly well and are what humans widely use (Hutchinson & Gigerenzer, 2005). Sharing rules can be seen as fairness heuristics that help disputants to determine what a fair or acceptable outcome is, fast and against low costs.

3.4 Summary and Discussion

3.4.1 Summary

I discussed several properties of sharing rules that are suggested in literature as desirable. I evaluated these properties and looked whether they are likely to have a positive effect on the acceptability of possible outcomes and whether they are likely to reduce parties' costs of dispute resolution. I found that most of these properties probably have these positive effects. The effects of some properties are hard to determine on the basis of current knowledge, but are likely to be positive. The next table summarizes the findings.

Effects on: Properties:	Acceptability	Costs of dispute resolution
Independent of willpower/reduced self-serving biases	+	+
Legitimacy/reflecting justice preferences	+	+/-4
Continuous (instead of providing yes/no answer)	+	+
Reciprocal/applicable to similar elements of situation at both sides	+	?
Belonging to parties	+/-	?
Non-exclusivity/more competing criteria	+	+
Tailoring to individual circumstances possible	+	?
Practical/saving on information costs	+	+
Providing social information	+	+

3.4.2 Availability of sharing rules

Usually, the answers to the question what kind of rules are desirable come from the supply side. Generally, the assumption is that rules have to be designed on the basis of what citizens ought to do. In this study, I took the perspective of the kind of rules that help people to settle their disputes. I identified nine properties that possibly have a positive effect on acceptability of outcomes and reduce costs for disputants. This raises the question how legal systems actually perform in delivering rules that help disputants to settle disputes. In this section, I give an impression of the availability of suitable sharing rules.

In one view, private law is full of sharing rules and objective criteria. Rules regarding contract formation, contract consequences, tortuous conduct and civil procedure are manifold. For many other relationships, similar detailed rules do exist: the rules of company law and administrative law, for instance. These legal rules are constantly being refined by court decisions, contributions of legal doctrine, and, occasionally, statutory law. Contracts and specialized regulations set criteria for specific relationships.

[4] Depends on the justice principle that is used.

But in actual disputes, these rules may be of limited help to disputants having to divide the pie. Most of the default rules of contract law, for instance, only set the stage. They invite the parties and the courts to inquire into certain circumstances. A key provision of the law regarding sale of goods, for instance, relates to the quality of the goods that can be expected. According to § 2-314 Uniform Commercial Code goods must be at least such as:

(a) pass without objection in the trade under the contract description;
(b) in the case of fungible goods, are of fair average quality within the description;
(c) are fit for the ordinary purposes for which goods of that description are used;
etc.

Application of this type of rules involves a quite extensive fact-finding process, followed by additional interpretation of the norms as they are applied to the facts.

Moreover, contracts, as well as other regulations, are often incomplete: they do not (and cannot) take into account all contingencies. A very common category of disputes relates to the termination of long-term relationships (family, employment, land use, business contracts). Agreeing about the consequences of termination, such as the division of common assets, compensation for specific investments, timing and notice periods, and continued relationships with clients and others, may be very difficult because civil codes and contracts give little guidance as to the ways to cope with these distributive issues.

As to liability issues, which are usually of a "yes or no" character, disputants may find many precedents in similar cases. But the question is whether this information forms a pattern that enables the parties to predict the odds of a yes or a no answer by the court. Sometimes, the issue is so clear that a pattern of, say, 9 precedents in one direction and 4 in the other direction is visible. In many real life disputes, however, a claim can be built on a multitude of "wrongful behaviours" by the other party. Contract disputes, for instance, often arise out of a complicated interaction between the parties, to which many people have contributed. Predicting the outcome on the basis of precedents becomes difficult, in part because courts are completely free to find liability on the basis of one or more of the acts committed, or on the basis of the whole pattern of behaviour that the plaintiff has demonstrated.

As to the amount of damages, similar difficulties arise. Tort law gives a right to full recovery of all damages sustained. In practice, precise calculation of damages can become very complicated, for instance in cases of personal injury, where future income has to be calculated, or in contract disputes, where the claim consists of lost profits. In some legal systems, courts or juries have much discretion in determining damages awards. They can award "general damages", "punitive damages", or have discretion to estimate damages. Sharing rules that

really show disputants that they will be treated similar to other people if they accept a certain offer, however, are rare.

Still, many rules that enable the parties to compare outcomes to objective standards do exist. Sometimes, case law gives clear guidance. In some jurisdictions, for instance, case law regarding liability for automobile accidents has developed standards for a deduction percentage in case a victim did not wear a seat belt, or a helmet. In Germany and the Netherlands, accidents between cars and pedestrians will be decided on the basis that at least 25 or 50% of the damages will be borne by the (insurer of) the driver of the car, because of the inherent danger caused by a car in general, unless the pedestrian acted grossly negligent. If courts have to process many cases of the same type, they may be inclined to develop guidelines, or to accept guidelines developed by others. Although commentators raise objections (Bovbjerg, 1989), many jurisdictions have schedules for damages awards in personal injury cases. Similar set ups may exist for determination of the consequences of a divorce, in the form of calculation schemes for alimony and rules for dividing marital property. Other jurisdictions have schedules for severance payments in case of termination of an employment contract by the employer.

Of course, this glance is too incomplete to draw very firm conclusions. However, it leaves the impression that legal systems do not abundantly deliver suitable sharing rules. Most substantive legal rules do not function as objective criteria, either because they are too abstract, or, as is the case with the refinement by the courts, are too ubiquitous and divers.

3.4.3 Creation and delivery of sharing rules

If using sharing rules has such positive effects, why do we not see more of them? One answer might be that drafting such rules is costly. But social norms, and norms more in general, are public goods because their cost does not rise if more people use the norm; and because people who do not contribute to its creation or enforcement cannot be denied its benefits (not excludable and non-rivalrous in consumption). The norm is, therefore, in danger of being under-produced (Posner & Rasmusen, 1999). This is where governments could step in to supply sharing rules, or other models could be developed which avoid the problems associated with the costs of creating and delivery of information.

Obviously, it is not always worthwhile to produce sharing rules. There is a trade-off between the costs of developing sharing rules and the costs of dispute resolution saved by using them in combination with the enhanced acceptance of outcomes reached on the basis of these sharing rules. Economies of scale are important in this respect. If similar disputes occur frequently, developing sharing rules for them makes sense, in particular if they have the properties discussed in this study.

Another issue that I have left untouched is the other roles of sharing rules besides being tools that settle disputes. Sharing rules will not only influence how people deal with disputes, but also how they behave before a dispute arises. "Rules of adjudication" are also "rules of conduct," because expected outcomes in dispute resolution processes are incentives. The goal of optimizing incentives may require other properties of objective criteria than the goal of helping people to solve their disputes. For instance, optimal deterrence may require fault liability, whereas comparative negligence is preferable from the perspective of dispute resolution that leads to acceptable outcomes against low costs. There may be other goals, such as optimal spreading of risk that are also relevant for setting sharing rules.

There may be more consequences of making sharing rules available, that we have not discussed in this study. For instance, the going rates of justice are not always fair rates of justice. So, publication may lead to increased compliance with unjust rules for distribution (although unfair rules will have a reduced compliance rate because acceptance will be lower, knowing that these rules are actually applied may still lead to more compliance in comparison with the situation without this information). On the other hand, publication may also make unfair practices easier to detect, to criticize, and to change eventually.

3.4.4 Conclusion and suggestions for further research

In this study, I looked at the demand for rules. In particular, I investigated which kind of rules likely support disputants if they want to settle distributive issues in an acceptable and low cost manner. Research on sharing rules, descriptive social norms, fairness norms, criteria for distributive justice, or "the 'going rates of justice'" is not in the mainstream of any of the disciplines that deal with norms. That may be related to the finding that people tend to underestimate how they are influenced by norms and other information that allows social comparison.

The literature review implies that sharing rules, if appropriately designed, can be very effective tools for dealing with distributive issues. There are many possible properties of sharing rules discussed in this study that at first sight are likely to enhance the acceptance of outcomes. The effects on the costs of dispute resolution are sometimes ambiguous, but some recommended properties are also very likely to lead to cost savings. So, my analysis suggests that legislators, drafters of contracts, courts, designers of dispute systems, and others wanting to contribute to conflict resolution should consider to invest more effort in creating and supplying sharing rules.

Though my findings imply that availability of sharing rules can be an important contribution to fair and efficient dispute resolution, by no means I suggest that they are by themselves capable to do this job. A dispute system also needs to supply opportunities to meet and talk, communication and negotiation skills, the credible threat of neutral intervention, and incentives to live up to outcomes. Without these other elements, there is even a danger that the 'going rates of

justice' reflect unfair outcomes induced by unsatisfactory power structures. Still, I believe that transparency of sharing rules has – generally speaking – a positive role in a dispute system, because unfair criteria are less likely to be followed, and publication of unfair criteria makes criticism and scrutiny of unfair practices possible.

More insight in the position of sharing rules in negotiations would make it possible to obtain a better understanding of the way sharing rules could positively affect acceptability and reduce costs. In particular, the way in which sharing rules influence perceptions of fairness and satisfaction needs to be further explored. For instance, recent studies found indications that external social comparison and objective standards have strong effects on people's evaluations.

The way the legal system produces and applies sharing rules is a valuable topic for further research as well. The first impression is that they are under-produced, but a more thorough investigation of the quality and quantity of sharing rules in legal systems is warranted.

4 Fair sharing: basic criteria for outcome justice[5]

4.1 Establishing fair shares: basic criteria for outcome justice

4.1.1 Introduction

The question what a fair share looks like is at the heart of the development of sharing rules. Sharing rules help to make big ideas as justice, fairness, and reasonableness concrete so disputants can develop a concrete idea of what they can look like for their disputes. Although there are little of such concrete guidelines for the practice of justice, there are numerous principles of justice can be of support.

There are many different perspectives on justice and fair sharing. Justice theories are as rich as they are abundant. For centuries, philosophers, economists, lawyers, politicians and many others have debated the questions what a fair distribution of value is. Between the members of society but also between individuals. During recent decades, research has developed that is complementary to normative theories. Empirical studies found principles and criteria that people actually use when they evaluate the justness and fairness of distributions. In this study, I present a shortlist of basic criteria for outcome justice that is useful for evaluation the shares indicated by sharing rules.

I develop a shortlist of basic criteria for outcome justice in the following way. First, I investigate which justice principles are regularly proposed in the theoretical justice literature. I also include other literature relevant to distributive outcomes in interpersonal interactions. As I will show, however, justice theories are very encompassing. Most alternative principles I found, such as efficiency or improving relationships, are also part of some theories of justice. Not every principle ever proposed makes it to the shortlist. It should be a principle that is still upheld in theoretical writings, notwithstanding critical scrutiny.

Next, I include empirical literature on justice (fairness) in the analysis. Empirical research shows that people have different "tastes for fairness" in different contexts. I collect research findings from several contexts, varying from workplace conflicts to evaluations of victim–offender programs and compliance rates regarding settlements or judgments in the area of personal injury. For the shortlist of principles, I only select principles that a substantial proportion of the population actually uses to evaluate outcomes.

Principles are general in their nature. This makes them less suitable to use for evaluation of outcomes indicated by sharing rules. Thus, as a final step, I translate the justice principles that form the shortlist into criteria that can be used for evaluation.

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[5] This chapter is adapted from a paper co-authored by Maurits Barendrecht, Laura Klaming and Peter Kamminga.

4.1.2 Approach

Section 4.2 reflects the results of the literature review. I discuss the theories of justice that are distinguished in literature. For each theory, I list the principles I found. Principles are only put on the shortlist if (a) they are regularly proposed in theoretical (normative) literature and (b) empirical research confirms that a substantial part of the population actually uses them.

Principles of justice are the most basic rules that, according to a certain theory of justice, should be operated in order to govern the world justly. These can be perceived as the reasons underlying a certain outcome, reasons that are justified by justice theories. An example of such a principle is the distributive principle of equity from equity theory. Principles often have to be translated into criteria for assessing outcomes. These criteria are the actual standards corresponding to justice principles whereby justice may be measured. For example, a criterion for outcome justice related to the principle of equity is that the distribution reflects the contribution to the issue of both parties. Most of the time, the theoretical literature already gives such criteria. Sometimes, we had to formulate them ourselves.

In section 4.3, I list the results and present a table that gives an overview of the indicators and criteria I found that meet the set conditions.

4.2 Principles and criteria for justice

This section presents a review of the literature on justice and fairness. I reviewed the following theories of distributive justice, restorative justice, corrective justice, retributive justice, transformative justice, informational justice, legal pragmatism, and formal justice. Most of these theories have a rich tradition. In each paragraph, I briefly summarise the theory. Next, I discuss the justice principles that each of these theories suggest, as well as the empirical evidence that people actually apply these principles in real life. This results in a list of criteria that meet the two conditions I defined.

4.2.1 Distributive justice

Distributive justice theories are perhaps the most well known theories about fair sharing. These theories focus on how a society or a group should allocate its resources among individuals with competing needs or claims. Distributive justice has a long tradition. Distributive justice had the attention of ancient philosophers like Aristotle, who developed a distributive justice theory based on proportionality (Konow, 2003b). Since then, many other philosophers but also scholars in the area of social sciences focused on principles for just distribution of social resources (Cohen, 1986; Konow, 2003b; Sabbagh, 2001; Thibaut & Walker, 1975). Their theories give guidance on the criteria that ensure that each person is rendered what is due (Konow, 2001, 2003b; Sabbagh, 2001). Distributive justice theories consider the various settings in which it is

prominent. Some theories focus on allocation of resources at a societal level, some focus on allocation between individuals, whilst taking different social contexts into account (Konow, 2001, 2003b; Sabbagh, 2001). Theories of distributive justice also differ in the claims they make; some focus on a single and universal justice principle, whereas others specify multiple, independent justice principles (Konow, 2001; Wagstaff, 1994).

There are many competing views on distributive justice. In order to collect the different basic criteria these views propose, I follow the categorisation of distributive justice theories proposed by Konow (Konow, 2003b). These three categories include equality and need perspectives, utilitarianism and welfare economics, and equity perspectives.[6]

Equality and need perspectives put special emphasis on the concerns of weaker members of society, i.e. those people who are least advantaged. Some examples of the theories in this category are egalitarianism, Rawls's theory of justice, and Marxism. Egalitarianism propagates equality of outcomes, which refers to the belief that resources should be allocated equally among all people. Thus according to this principle, an outcome is just when the input or needs of recipients are disregarded in the decision-making process. Empirical studies found that people favour the principle of equality in cooperative relationships (Deutsch, 1985).

The need perspective emphasises that resources should be allocated according to people's needs (Deutsch, 1975; Deutsch, 1985; Mannix, Neale, & Northcraft, 1995). According to this view, an outcome is just if the needs of individuals are proportionally reflected in the outcome. The need principle emerged from Marxism and Rawls's theory of justice. According to the first, the needs of people are decisive in any allocation of goods. What the members of a society receive should be determined by their needs instead of their abilities (Konow, 2003b). In his theory of justice, Rawls emphasized that goods should be allocated equally among the members of the society, unless the needs of the least advantaged people require an unequal distribution (Rawls, 1971). Empirical studies found inconsistent results when it comes to the actual application of this principle (Frohlich, Oppenheimer, & Eavey, 1987; Lamm & Schwinger, 1980). Insights from social psychology research demonstrated when people intend to maximise their own profits, they damage the group as a whole in the long run. Given this finding, it seems logical that most people favour other principles of justice over the needs principle or, differently put, that the context plays an important role in explaining which distributive principles are used when determining a just outcome.

[6] Konow (2003) proposes that there are four theoretical categories in which justice theories can be placed. The fourth category, context, discussed views about the context-dependency of justice principles. This category does not generate distributive justice principles and is therefore not included here.

Adams argued that outcomes an individual receives should reflect his efforts (Adams, 1965). To determine whether the outcome is fair, an individual should compare his outcome-to-input ratio to that of a comparative other. This is known as equity theory (Adams, 1965). Input can be defined in terms of effort, social and economic capital, know-how, and other forms of contribution. Moreover, both contributions that have a positive (profit) and a negative (losses, damages) impact are relevant. Other researchers described this theory as a normative rule that determines the allocation of resources according to the recipients' contributions and as proportionality between the individual's outcome and his inputs or contributions (Deutsch, 1985; Leventhal, 1976). Hence, according to equity theory, justice is achieved when the proportionality between outcome and input is equal for all individuals or parties involved. Some stipulated that people always try to maximize their outcomes and minimize their inputs (Walster, Berscheid, & Walster, 1973). And that inequity causes distress and consequently results in attempts to restore equity (Walster et al., 1973). Empirical research demonstrated that perceived distributive injustice indeed results in emotional distress, which may have several behavioural consequences. Like, for example, appealing a court or other decision (Mikula, Scherer, & Athenstaedt, 1998; Walster et al., 1973).

A distributive justice principle that is also mentioned within the context of equity theory is the accountability principle (Konow, 2001). Whereas the principle of equity does not necessarily differentiate between different types of contribution, the accountability principle does. Konow distinguishes discretionary from exogenous variables (Konow, 2001). Discretionary variables affect output and can be influenced, whereas exogenous variables are variables that cannot reasonably be influenced but nevertheless affect output. Konow gives the example of work effort for the first and a congenital condition such as missing a hand since birth for the second (Konow, 2001). According to this principle, the distribution of resources should be proportional to volitional contributions. In addition to the accountability principle, the efficiency rule has been formulated. While the accountability principle refers to the proportionality of size of distributions, the efficiency principle deals with the absolute size of distributions. More specifically, the efficiency principle states that allocations should be maximized (Konow, 2001, 2003b).

It has been argued that the context determines which of these distributive rules — equity, equality, and need — is used in order to determine a fair outcome (Deutsch, 1985; Konow, 2003b). Equity is mostly favoured in competitive relationships, whereas in cooperative relationships people tend to use the principle of equality more often (Konow, 2003b). The following table summarizes the distinct criteria of distributive justice:

Indicator	Criterion
Equity	The outcome is proportionate to the contribution.
Equality	The distribution gives both parties an equal share.
Need	The distribution is proportionate to both party's needs.
Accountability	The distribution is proportionate to volitional contribution.
Efficiency	The distribution maximizes the welfare of the parties.

4.2.2 Restorative justice

Restorative justice is a relatively new theory within the fields of victimology and criminology. It offers an alternative to traditional criminal justice perspectives that focus more on retribution. Restorative justice puts emphasis on reparation of the harm caused or revealed by the offender. Consequently, restorative justice procedures require the participation of the victim, the offender, and the community.

Restorative justice has its roots in criminal justice, and therefore the vast majority of theoretical and empirical research has focused on the criminal justice system (Braithwaite, 2002; Gromet & Darley, 2006; Latimer, Dowden, & Muise, 2001; Marshall, 2003; Menkel- Meadow, 2007). As Roche noted, "the widespread, and court sanctioned use of mediation to settle civil litigation can also be seen as an important example of restorative justice" (Roche, 2006). Considering the needs of victims of personal injury, principles of restorative justice seem to be useful in order to enhance feelings of fairness. Restorative justice principles have also been applied both theoretically and practically to human rights violations and international law (Menkel- Meadow, 2007; Roche, 2006). While the majority of research on restorative justice comes from the criminal setting, its principles apply to other contexts.

The aim of restorative justice is threefold (Gromet & Darley, 2006; Marshall, 2003; Strickland, 2004). First, it seeks to provide restitution to victims by considering and repairing the emotional and material harms caused by the offense. Second, restorative justice aims to increase the offender's compliance with the law in the future. For example, by having them realise and accept the consequences of the harm they caused the victim. The third aim of restorative justice is to repair the harm caused to the community. And to making an effort to repair the relationships between the criminal offender and the community by reintegrating the offender. Restorative justice takes both the victim and the offender into consideration. The idea behind this is that in this way it provides something positive to both parties.

Restorative justice might contribute to an increased satisfaction with procedures and outcomes for both the victim as well as the offender (Gromet & Darley, 2006; Marshall, 2003). Restorative justice is said to be beneficial to victims and the community in procedures. And at the same time it aims to treat offenders with more respect than in traditional criminal justice procedures. A goal related to the principles of procedural justice (Lind & Tyler, 1988). People who feel that they were treated fairly report higher levels of satisfaction with the justice they got, which is positively correlated to compliance. Restorative justice can therefore be of additional value to traditional criminal procedures. These latter primarily intend to achieve the establishment of accountability by punishing the offender. The benefit for victims is that their needs are considered, something that is typically not done by the traditional criminal justice system. Restorative justice procedures give victims the opportunity to express their feelings and explain the consequences of the harm that was caused. Considering these types of needs of victims increases their empowerment, as it directly involves them in the administration of justice. A further advantage of restorative justice for victims lies in its potential to increase transparency of criminal justice procedures. The direct involvement of victims results in an increased understanding of the criminal justice system and procedures. Research demonstrated that restorative justice programs contribute to increased victims' satisfaction with procedures and outcomes (Gromet & Darley, 2006; Latimer et al., 2001). Next to fair treatment, the benefit of restorative justice for offenders includes the focus on reintegration into society. Traditional criminal procedures only marginally seem to achieve reintegration of criminals into society and reduction of recidivism (Gromet & Darley, 2006; Marshall, 2003; Menkel-Meadow, 2007). Proponents of restorative justice believe that focusing on reintegration into society of the offender by means of the distinct techniques of restorative justice reduces recidivism rates (Zehr & Mika, 1998). Tyler (Tyler, 2006) argued that increasing the motivation of people to obey the law can be achieved by involving people in fair procedures that enhance their internal motivation to obey rules. From the perspective of the offender, the goal of restorative justice is to enhance the acceptance of responsibility for the harm inflicted on the victim, which is believed to increase the perpetrator's motivation to comply with the law in the future (Braithwaite, 2002; Tyler, 2006). Although there is an ongoing debate as to the effectiveness of restorative justice programs, research indicates that it succeeds in decreasing recidivism (Latimer et al., 2001).

The practice of restorative justice embraces a variety of different practices, including apologies, restitution, and acknowledgement of harm and injury, as well as other efforts to provide healing and reintegration of offenders into their communities, with or without additional punishment (Menkel- Meadow, 2007). Specific techniques include victim–offender reconciliation, victim impact statements, and community conferencing (Strickland, 2004).

To summarize, the central premise of restorative justice is that victims, offenders, and the community are all key stakeholders in the process. The three major goals that have been identified in the literature can be translated into two

restorative justice principles, that is, criteria that people consider just. These criteria include the role of the community in achieving the aims of restorative justice.

Indicator	Criterion
Restoration/reparation	Emotional and material harms have been repaired. The offender acknowledges that he or she has done harm and accepted responsibility for his or her behaviour. The offender accepts the decision. The offender complies with the decision.
Reconciliation/reintegration	The offender is reintegrated into the community. The probability of the offender's future compliance with the law is increased.

4.2.3 Corrective justice

The foundation under corrective justice theory is the Aristotelian idea that when one person has been wrongfully injured by another, the injurer must make the injured party whole (Aristotle, 1985). Corrective justice is widely supported by philosophers of justice. It is also reflected in the sanctions of the legal system. The remedies for breach of contract and for torts usually include compensation of damages. Damages are usually calculated as the value of the injured goods, as the costs of remedying the situation, or as making up for lost profits. Corrective justice is also reflected in the legal system where it provides for restitution (Smith, 2001; Virgo, 1999).

Corrective justice attempts to undo illegitimate losses and gains through bilateral and direct vindication. If there has been a wrongful transaction, corrective justice requires that the initial equality of the two parties be restored. It requires those who cause losses by acting in wrongful ways to repair, correct, or annul such losses (Weinrib, 1994, 2000). In particular, it requires that the wrongful act of one person be matched by the unjust loss of the other person (Weinrib, 1995). This matching can cause tensions within the legal system because sometimes a small wrong (negligence) leads to a big loss.

Corrective justice is clearly linked to restorative justice because it also concentrates on repairing harm. Most writers assume that restorative justice is broader than corrective (compensatory) justice because restorative justice goes beyond restitution and repairing of harm in that it also restores value consensus and may even include elements of punishment to that effect (Wenzel, Okimoto, Feather, & Platow, 2007).

There can be little doubt that corrective justice is an important way of thinking about just outcomes, but there has been far less research done on corrective justice than on restorative justice. What has been established, however, is that people find correction (or compensation) appropriate in cases of careless conduct causing damages (Darley & Pittman, 2003; Enzle & Hawkins, 1992). Some degree of negligence is necessary in order for people to find compensation appropriate. Merely accidental harm is not a sufficient basis for compensation (Darley & Pittman, 2003). Attributions of responsibility for accidental harm suffer from outcome bias, however. The more severe the outcome, the easier respondents assume negligent conduct (Mazzocco, Alicke, & Davis, 2004).

Indicator	Criterion
Correction	Losses and gains caused are corrected.

4.2.4 Retributive justice

Retributive justice is described as the oldest, most basic, and most pervasive justice reaction associated with human life (Vidmar, 2001). The key idea is that a sense of justice demands infliction of loss and pain on the aggressor. And that this loss and pain is proportionate to that inflicted on the victim. Retributive justice may be described as the idea of seeking to balance an injustice by rectifying the situation or by regaining an equality that the injustice had overturned.

Retributive justice is thus related to the concept of corrective justice. The most important difference between these dimensions pointed out in literature is that retributive justice focuses more on punishment of the wrongdoer, whereas corrective justice focuses more on what is needed to restore the status quo ante (Coleman, 2003; Sanders & Hamilton, 2001).

Empirical evidence shows that retributive justice, or just deserts, is the main motive for sentencing in the United States. It trumps incapacitation or deterrence of future crimes as motives for sentencing (Carlsmith, Darley, & Robinson, 2002). In other (more collectivist) cultures, this may be different, and respondents are more inclined to use other motives for punishment or sentencing (Darley & Pittman, 2003; Hamilton & Sanders, 1988; Na & Loftus, 1998).

If a person can be accused of recklessness, the number of respondents who require punishment increases. This increase is bigger than the increase when the attribution changes from recklessness to intent, suggesting that the boundary between negligence and recklessness is the main threshold that has to be passed between corrective justice to retributive justice (Babcock, Loewenstein, Issacharoff, & Camerer, 1995). The reckless person is either (a) conscious of the risks he is running but chooses to run them, (b) runs the risk of causing greater harms than are risked in cases of ordinary negligence, or (c) both (Darley & Pittman, 2003). To give an example for this, Karlovac and Darley found that

about 50% of perceivers assigned some prison time for the offender, as well as compensation to the victim, when the harm-doer parked a truck on a hill above a children's playground and took what perceivers saw as too few precautions against the truck rolling downhill. Even if the truck only harmed a piece of property (Karlovac & Darley, 1988). When only property damage was risked by parking the truck, compensation and a fine were seen as sufficient. This study demonstrates the importance of recklessness and intent, as well as the risks involved in the attribution of blame and responsibility and, hence, what people consider a fair outcome.

What triggers the size of the retribution? The more serious the harm, the more harsh the sanction. Although people vary as to their preferences for the size of sanctions, there is remarkable consistency in how people rate the comparative seriousness of crimes (Darley & Pittman, 2003). The motives (recklessness, intent) of the perpetrator are also important determinants of the size of the retribution (Darley & Pittman, 2003). People would consistently lower prison sentences for offenders who successfully completed restorative conferences. If offenders fail to successfully complete a restorative conference, the sentence would not be increased (Gromet & Darley, 2006).

Indicator	Criterion
Just desert	The offender was punished in a way proportionate to the wrongful action.

4.2.5 Transformative justice

Transformative justice can be seen as a philosophical strategy to respond to conflicts and is also referred to as peacemaking. Its goals are reconciliation and deterrence, learning to live with one another, and continuing to do so in the future (Daly, 2002). The basic idea behind transformative justice thus shows similarity to the idea behind restorative justice. However, whereas restorative justice primarily focuses on the criminal justice system, transformative justice has a broader scope. It takes the principles underlying restorative justice beyond the criminal justice system.

From a transformative justice perspective, conflict resolution is less about the application of techniques or models for managing conflict than a search for processes that can make possible myriad transformations of self, self-in-relationships, self-in-society, as well as transformations in the structural realm (Fetherston & Kelly, 2007). It focuses on a fundamental transformation of underlying problems. Transformative justice is concerned with transforming relationships between disputants by focusing on root causes.

Conflict is regarded as a transformative relational and educational opportunity for the parties involved. Disputes are framed in terms of violations of relationships rather than in substantive terms. The central aspect of transformative justice is to bring individuals together in a process that

encourages growth and development. It is concerned with dealing with the past in the present. A desired future situation is defined, after which the steps that are needed to get there are clarified. The focus is put on interests, not entitlements and claims. In the view of transformative justice, it is important that parties are enabled to frame issues and affect outcomes according to their particular interests (Law Commission of Canada, 1999). Also, the community plays an important role in supporting the contact between parties.

Few empirical studies specifically testing principles of transformative justice are available. However, as previously stated, transformative justice builds on restorative justice, a thoroughly studied area. As far as it concerns the emphasis on interests and communication between parties, empirical evidence can be found in studies relating to integrative methods of negotiation. Generally, research to integrative methods of negotiation demonstrates that sharing information about interests is essential in obtaining an outcome that both parties are likely to view as fair.

Indicator	Criterion
Transformation	The conflict was reframed in terms of relationships. Individuals are brought in a process that encourages growth and development. The outcome reflects the interests of the parties.

4.2.6 Informational justice

Over the past decades there has been a tremendous amount of theoretical and empirical research on procedural justice, which refers to aspects that a procedure should meet in order to be perceived as fair (Van den Bos, Wilke, & Lind, 1998; Van den Bos, Vermunt, & Wilke, 1997; Lind & Tyler, 1988; Thibaut & Walker, 1975; Tyler, 1996; Tyler, 1984). One of these aspects also refers to outcome justice. Research has demonstrated that people are more satisfied with an outcome and are more likely to comply with it when they receive an explanation or justification about the outcome. This facet of justice has been referred to as informational justice. Explanations should convey information about both procedures and outcomes. With regard to the quality of outcomes, an adequate justification enables people to better understand why a certain decision was made and why they received a certain outcome.

An explanation about the outcome may be of particular importance when the outcome is perceived as unfair. If people perceive their outcome as unfair, they are likely to search for information that helps them to determine why they received an unfair outcome. In the absence of an explanation, they are likely to base their evaluation on information that is available to them. This typically includes information about the procedure or the decision-maker. Hence, it

might, for example, be inferred that the outcome was based on inaccurate information or that the decision maker was biased, while this claim may objectively be invalid. Explanations influence fairness perceptions because they may convey the impression that a decision has been based on accurate information and that the authority has acted in an unbiased, consistent, and reasonable way. If no explanations are provided, a person may infer that a certain decision was obtained in order to intentionally disadvantage him or her (Bies & Shapiro, 1987).

Providing a thorough explanation about the outcome can increase acceptance of and compliance with an outcome. Research demonstrates, for example, that providing them with a causal account could reduce people's feelings of inequity after receiving an inequitable outcome. Moreover, people's behavioural reactions were found to be influenced when they were provided with an explanation about why they received an inequitable outcome (Greenberg, 1993; Shapiro, Buttner, & Barry, 1994). In particular, information about and transparency of the outcome are therefore believed to be important aspects of the quality of an outcome.

Indicator	Criterion
Justification	The parties received a thorough explanation about their outcome.

4.2.7 Legal pragmatism

The next perspective does not focus on a theory of truth or a theory of meaning. Rather, legal pragmatism focuses on the practical consequences of legal theory. It looks at problems concretely and bases action on facts and consequences. It rejects moral, legal, and political theory when it comes to guiding legal decision making (Posner, 2003). Legal problems should be solved by using every tool that comes to hand, for instance, precedent, tradition, legal texts, and social policy (Farber, 1988). In this sense, it can be described as an eclectic, results-oriented antiformalism (Luban, 1996).

Advocates of legal pragmatism strongly diverge from one another, and legal pragmatism has been described as a "desperately confusing scholarly mare's nest" (Haack, 2005) This can be explained by the fact that it does not depart from a set of principles for justice. Rather, it is composed of a core set of claims, emphasizing instrumental reasoning, eclectic perspectives, foundationless inquiry, and attention to context (Butler, 2002). In the view of legal pragmatism, law is contextual. The emphasis should be put on a particular and concrete context, not on philosophical abstractions. Further, legal pragmatism is antifoundationalist. This means that it rejects the idea that correct outcomes can be deduced from some overarching principle or set of principles (Cotter, 1996). Furthermore, no central or finished set of legal materials exists that ensures a proper decision every time. Also, the consequences of interpretations and outcomes should be carefully considered. It emphasizes a need to consider the question of what the possible societal results of a certain decision are. Finally,

legal pragmatism can be said to be perspectivistic. In order to safeguard reasonableness, a judge must take all available perspectives into consideration.

Several different studies of judicial decision making and the court system support the descriptive claims of legal pragmatism (Butler, 2002). Also, the practice of alternative dispute resolution indicates that the central tenets of legal pragmatism truthfully describe aspects that people actually value.

Indicator	Criterion
Contextualism	The outcome took the concrete circumstances into account.
Antifoundationalism	The outcome was pragmatic.
Instrumentalism	The consequences of the outcome were taken into account.
Perspectivism	All practically relevant arguments were taken into account when deriving the outcome.

4.2.8 Formal justice

The last form of justice I include is formal justice. According to some, justice can be known and done only through the maintenance and equal application of general rules of law (Rawls, 1971). What is right or just for one case must also be right or just for all relevantly similar cases (Carr, 1981). Adjudicative bodies should reason by analogy and treat like cases alike (Jacobson, 1996).

According to this perspective, justice is made impersonal by narrowing the range of discretion of decision makers. The likeness is concerned with actions and situations, not with the type of people. Further, legal commands, such as outcomes, must be public and sufficiently clear so that those addressed by it are capable of complying with them. Furthermore, there must be a procedure for establishing the facts necessary to the application of the command (Posner, 1990; Rawls, 1971).

Formal justice is essential to the concept of rule of law. Its essence is non-arbitrariness, and it is a logical requirement of rationality (Kolm, 1996). Equal treatment is an ideal to wards which civilized legal systems can generally be seen moving (Tebbit, 2005). Equality before the law is part of many constitutions. It is easy to find empirical evidence for the principle of formal justice (Konow, 2003b). The principle seems uncontested in literature. Also, empirical studies show that people compare their outcomes with the outcomes of comparable others when evaluating the fairness of outcomes. This evaluation has strong effects on the perceived fairness of the outcome (Novemsky & Schweitzer, 2004).

Indicator	Criterion
Formal equality	The outcome and the outcome of others are transparent in such a way that they can be compared in terms of equal treatment. The outcome is similar to outcomes in similar cases. The outcome is in accordance with the criteria that determine what are relevant similarities and differences with other cases.
Publicity	The rules that applied to the case were public. The rules that applied to the case were understandable.

4.3 Shortlist of principles and criteria

In the preceding section, I made an inventory of all relevant indicators and corresponding criteria for evaluating the fairness of distributions. In this section, I develop a shortlist.

I include principles on the basis of two decision criteria. First, they have to be relevant with regard to the purpose, meaning that only those principles that can be translated into evaluation criteria are relevant and meaningful. Not all principles discussed in the previous sections seem relevant. For instance, the reintegration principle from restorative justice theory does not yield a criterion that can be meaningfully used for evaluation. In addition, some principles might be more indicative of the quality of the procedure but not the fairness of sharing. For example, one criterion of the restoration principle refers to the acknowledgement of the harm caused and the acceptance of responsibility. This criterion is part of the quality of the procedure rather than the fairness of the distributive outcome and is therefore not included in the shortlist here. The shortlist presented below provides more information about the indicators, criteria, and items included in this instrument.

The second decision criterion deals with the overlap between several principles. For instance, transformative justice states that outcomes should reflect the interests of the parties. A similar criterion is also found in the legal pragmatism approach. In order to prevent duplication, a list including all the principles discussed above was created and analyzed in terms of resemblances. Subsequently, I excluded those principles that show overlap with one or more others. The excluded principles were:

Excluded principles	Reason for exclusion
Accountability: The distribution is proportionate to volitional contribution.	Integrated in equity.
Efficiency: The distribution maximizes welfare of both parties.	Not relevant/assessable.
Correction: Losses and gains caused are corrected.	Integrated in criterion for equity.
Just desert: The offender was punished in a way proportionate to the wrongful action.	Integrated in criterion for equity.
Contextualism: The outcome took the concrete circumstances into account.	Integrated in criterion for antifoundationalism.
Perspectivism: All practically relevant arguments were taken into account.	Integrated in criterion for antifoundationalism.
Publicity: The rules that applied to the case were public. The rules that applied to the case were understandable.	Not relevant.

The shortlist presented below includes all the principles and corresponding criteria that are indicators for fair shares and thus are useful for evaluating the effectiveness of sharing rules.

Justice type	Principle	Criterion
Distributive justice	Equity	The outcome is proportionate to the contribution of the parties.
Distributive justice	Equality	The outcome gives both parties an equal share.
Distributive justice	Need	The outcome considers the needs of the parties.
Restorative justice	Restoration/ reparation	Emotional and material harms have been repaired.

Restorative justice	Reintegration	The future compliance with the law of the other party is increased.
Transformative justice	Transformation	The conflict was reframed in terms of relationships. The outcome reflects the interests of the parties.
Informational justice	Justification	The parties received a thorough explanation about their outcome.
Legal pragmatism	Antifoundationalism	The outcome solved the problem.
Legal pragmatism	Instrumentalism	The consequences of the outcome were taken into account.
Formal justice	Formal equality	The outcome and the outcome of others are transparent in such a way that they can be compared in terms of equal treatment.

5 The effects of sharing rules: two experiments

5.1 Guiding information for fair sharing

5.1.1 Introduction

Haggling with an insurance company about compensation as a victim of a severe traffic accident can be a horrible experience. It is an example of bargaining in a bilateral monopoly, which is at the heart of many conflicts. The parties should agree on compensation with this one specific party and one party's gain is the other party's loss. The bargaining literature shows that extreme proposals lead to better end results, but a higher probability of impasse. In such situations, an option of neutral adjudication is crucial. Having the credible threat of a neutral intervention for the event they do not succeed to agree brings reasonableness to the bargaining table. A complementary option to induce parties to come with more reasonable proposals is to give them a point of reference for fairly dividing value or damages. Legal information enables parties to bargain in the shadow of the law (Mnookin & Kornhauser, 1978). Conveying reference information through general norms that are refined through tailored case law is considered state of the art by legal theory. Negotiation theory emphasizes that conveying information through general but concrete sharing rules is an effective way in terms of fairness and efficiency and helps to prevent disputants from haggling through their distributive negotiations (Fisher et al., 2011). In this study, I examine the effects of different types of reference points: 1) general open norms as often found in legal codes, 2) specific norms tailored to a given set of circumstances as often conveyed through case law, and 3) sharing rules and other objective criteria that are sometimes developed by (commissions of) judges, academics and other experts. I measure the effects of these reference points on the first proposals that people make in bargaining situations and on their response to proposals made by the other party.

The legal system provides for several sources of reference points and different methods for conveying them. Laws often provide for more general, open-ended norms. For damages resulting from personal injury after a car accident, for instance, such a norm might state that the victim has a right to full compensation of all the actual damages suffered. Judges give meaning to and refine these norms through their decisions. These decisions ideally provide more concrete norms that give practical guidance (Schauer, 1994). Reality is that court decisions often indicate outcomes that are primarily tailored to all the specific circumstances of the case at hand. A judicial decision might mention the most relevant circumstances (age, profession, fault of the other party, weather and traffic conditions, speed at the time of the accident, whether the victim wore a seat belt or not, etc) and the amount to be paid. For some distributive issues there are sharing rules in the form of grids, tables, schedules, formulas and other objective criteria. These might not be an official source of law, but they give guidance to the practice of settlement for calculating amounts of compensation.

5.1.2 Extreme bargaining

To what extent do reference points based on general open norms, case law, and sharing rules reduce extreme bargaining behaviour and guide proposals of disputants? Thus far, no empirical study examined the different effects that information about the practice of dispute resolution and adjudication have on bargaining. Some dictator game experiments focused on the effects of information about how others shared as a reference point. This descriptive kind of information (telling people about the actual sharing behaviour of others) might have stronger effects than norms telling people how others think people ought to share (Bicchieri & Xiao, 2009). Subjects that received descriptive information more often and to a larger extent followed this sharing behaviour of others than subjects that were presented prescriptive information.

This finding is consistent with research from social psychologists that also found that behaviour of people is more strongly affected by descriptive normative information (showing them what others do) than by prescriptive normative behaviour (telling them what others think ought to be done) (Cialdini & Goldstein, 2004). Dictator experiments, however, position the one who has to divide in a situation where he has full control: the other party has to accept her share. In actual bargaining situations, she can always reject the proposal of the other side. Additionally, dictator games are often without context, although some exceptions exist (see (Pogarsky & Babcock, 2001). People only receive some value (usually a sum of money of the size of $10) and have to divide it between themselves and someone else. In real life situations, the context of the dispute (uncertainties about fact, uncertainties about how the other will behave, emotions, etc.) will also impact behaviour.

5.1.3 Two experiments

Two experiments examined the effects of reference points on disputants' bargaining behaviour. In both experiments, I focused on first offers. First offers have big impact on the actual sharing that takes place. They set the bargaining range within which disputants have to find a mutually agreeable outcome. First offers thus are strong indicators of extreme bargaining positions. Disputants who ask extremely much or offer extremely little have more extreme first offers. Reversely, more moderate first offers that are consistent with neutral reference points indicate a more efficient and perhaps even more balanced bargaining. In conclusion: if reference points have effects of the first offers disputants make, this also guides them on the outcomes of settlements.

Subjects of these experiments were first year students from Tilburg Law School. In the experiments, I presented them with vignettes with a so-called justiciable event. The scenarios mimicked real life bargaining situations that raise (civil) legal issues, whether people recognize them as such or not and whether they take action using some part of the civil justice system or not (Genn & Beinart, 1999). For example, when spouses bargain over the division of household tasks, this does not raise legal issues. In contrast, when divorcing spouses bargain over

sharing assets, child support, caretaking tasks, etc., this does raise legal issues. The vignettes were designed so that subjects (with age averaging at about 21) were likely to be able to relate to them (for example, the scenarios did not include issues of divorce and did include issues of dismissal of a part time job).

Experiment 1
In the first experiment I only tested the effects of reference points (framed as sharing rules) based on descriptive information on making first proposals and rejecting or accepting first proposals. This experiment had two independent variables, i.e. variables that were manipulated by design. The first was the availability of descriptive information that suggested them how to share. In one condition, subjects first saw the scenarios and then received these reference points. For example, one vignette positioned the subjects in a situation where they were dismissed from a job they had for a few years. The reference point conveyed the information that most employers pay a dismissal compensation of a month salary per year worked. In the other (control) condition, the subjects were positioned in the same situation but did not receive any additional information.

The experiment had a second independent variable. In one condition, the subjects had to make a first proposal to the other party, in the other condition, they had to reject or accept a proposal made by the other party. The results of the first experiment are presented in section 5.2.

Experiment 2
The second experiment also focused on the effects of reference points on bargaining behaviour. This second experiment built on the first experiment but was modified in several ways. Firstly, a difference with the first experiment was that this second experiment only measured the effects on first proposals that subjects made. These are believed to be sufficient to assess the effects of reference points on bargaining behaviour and the added value of responses for this cause are limited.

The second experiment further did not present the subjects with general reference points that convey descriptive information about how others usually share in similar situations. Rather, this experiment included reference points that are more similar to the reference points provided by the legal system. In real life bargaining situations that have legal issues involved, disputants usually do not find information that specifically informs them about how others usually share. The experiment had three conditions with different types of reference points as an independent variable. In the first condition, subjects received more general open-ended legal norms as reference points. In the second condition, subjects received general but concrete sharing rules as reference points. In the third (control) condition, subjects did not receive any additional information as reference point.

Earlier studies found that transparency and salience of norms guides bargaining behaviour (Bicchieri, 2000). In disputes, transparency implies that both parties have the same reference points. In order to mitigate the effects of perceived information asymmetries, disputants have to know that both parties have this information. In other words, they know that the other party knows that they have this information, just as they themselves know that the other party has the information. In order to create true transparency of information, in the experimental conditions, we presented the subjects a reference point and also conveyed to them that:

1. the other party knows the reference point;
2. the other party knows that the subject knows the reference point as well;
3. the other party knows that the subject knows that the other party knows the reference point;
4. the knowledge is also available to the subject the other way around.

Another important characteristic of real-life disputes are bilateral monopolies that have an exit option by going to court (Barendrecht, 2011). This exit option from the bargaining table impacts their proposals, as one dictator study found (Pillutla & Murnighan, 1995). The legal system typically aims to provide this neutral intervention by allowing people to go to court, thus strengthening the bargaining position of the weaker party (the party who wants to change the status quo, the one with least resources or most pressing need, etc.). The impact probably is affected by the expected costs and quality of this exit option (Gramatikov, Barendrecht, & Verdonschot, 2008b). This can put the more powerful party in a dispute in a stronger position. In the second experiment, I added instructions about the basic bargaining attitude of the subjects. These instructions told subjects that they should have an attitude of willingness to find a reasonable solution, but not at every expense. So they were instructed to behave as reasonable disputants. In addition, subjects were told that, ultimately, they could bring the case to court, which would take some time and money and which outcome would be uncertain.

In summary, the second experiment differs in three ways from the first experiment. Firstly, whereas the goal of the first experiment was to measure the effects of reference points merely consisting of descriptive information, the second experiment measured the effects of two types of information delivered by the legal system: 1) typical legal information like open ended norm and case law and 2) general but concrete sharing rules. Secondly, the second experiment measured the effects of transparency of reference points. Thirdly, the scenarios of the second experiment included the option of a neutral third party intervention, i.e. the option of going to court.

The results of the second experiment are presented in section 5.3.

5.2 Study 1

5.2.1 Research questions

The main research question of the first experiment was whether reference points that show the outcomes other people agree on guide bargaining behaviour. This resulted in the following two hypotheses:

Hypothesis 1.1: People who receive a reference point based on how other people usually share in similar situations make first proposals that are closer to the outcomes indicated by the reference points.

Hypothesis 1.2: People who receive a reference point based on how other people usually share in similar situations accept first proposals that are consistent with these reference points.

5.2.2 Method

Participants
401 first year students from the Tilburg Law School participated in the study. In exchange for their participation, they received course credit for a compulsory introductory private law course. 251 (62.6%) subjects were female and 150 (37.4%) were male. The mean age was 19.42 years (SD = 2.4 years).

Design
The subjects received four scenarios describing bargaining situations in which they and a fictitious other person had to share either value or damages. In two conditions, subjects received the instruction to make a first offer to the other party by indicating what they found a reasonable share. In the other two conditions, they received instructions to indicate whether or not they accepted an opening proposal from the other party. These two tasks alternated.

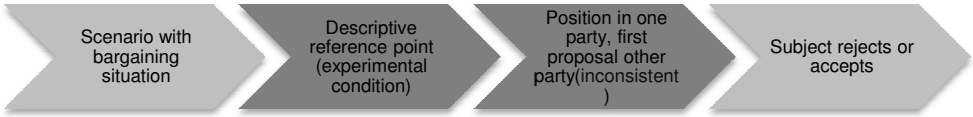
203 (50.6 %) participants received reference points (experimental condition), while 198 (49.4 %) participants did not receive any additional guiding information (control condition). The experimental and control conditions were further subdivided into two groups, with one receiving opening proposals that were consistent with the reference points and the other group receiving opening proposals that were inconsistent with the reference points. Hence, a 2x2 between subjects factorial design involving reference points (available vs. unavailable) and type of proposal (consistent vs. inconsistent) was used. Main dependent variables are the guidance of the proposals and responses to proposals by reference points.

Sequence of information experimental condition 1:

Sequence of information control condition 1:

Sequence of information experimental condition 2:

Sequence of information experimental condition 3:



Sequence of information control condition 2:

Procedure

Subjects were randomly assigned to the conditions. Each subject received a total of four scenarios. Each of these scenarios described situations with a distributive issue between two parties: one being the subject and one being another (fictitious) person. Participants received the instruction that they should imagine they were one of the parties involved in the conflict. Furthermore, they received instructions to make an offer for sharing and accordingly accept or reject the other party's offer.

Subjects assigned to the experimental condition received reference points in each scenario. These were designed so they had the properties found in chapter 3. The outcomes they indicated were proportionate in nature and non-binary. The information was straightforward and easy to apply, so that effects of calculating skills were minimized. For example, one of the scenarios described a situation where a friend had accidentally damaged a computer. The computer was five years old and had been purchased for € 600. The information for this scenario stated that for such cases, the damage usually is shared proportionate to the average life expectancy of the device, which was set at 6 years in this case. Consequently, the computer depreciates one sixth of its original value every year. The information indicated that the person who caused the damage usually compensates the remaining value. Subjects assigned to the control condition did

not receive any reference points based on descriptive information about how usually is shared.

After presenting the scenario (which in the experimental condition included the neutral information), participants received instructions to determine their offer by indicating what they find a fair share. Subjects received different categories of proposals for a reasonable share. The intervals between the categories were 50 euro or more, depending on the total value indicated by the reference point. When subjects had to make a first offer, subjects communicated this to the other party within the bargaining context of the experiment. In the other condition, they were positioned as the party receiving a first offer. They could accept or reject this first offer. A computer generated the proposals of the other party and all participants received the same offers.

Measures
There were two independent variables: 1) availability of reference point vs. unavailability of reference points and 2) received proposal consistent with the reference point vs. received proposal inconsistent with the reference point. There was one main dependent variable (bargaining behaviour's guided by the reference points).

The extent to which the reference points guided bargaining behaviour was measured in two ways. In the condition where the subjects had to make a first offer, it was measured by examining the consistency of their proposal with the outcomes indicated by the reference point. A proposal was defined as consistent if it was in a one-value range. For instance, if the reference point indicated an offer of 600, offers ranging from 550 (one value lower) to 650 (one value higher) were defined as consistent. The first offers subjects received were fully consistent with the outcome indicated by the reference point (experimental condition 2) or deviated more than the value of one range with the outcome indicated (experimental condition 3).

5.2.3 Results

As table 2 shows, the 401 participants were equally distributed across the four conditions. 203 (50.6%) of the participants were assigned to the experimental condition and 198 (49.4%) to the control condition. The sequence of the scenarios did not have an influence on participants' behaviour in terms of making and deciding on offers.

Table 1. Distribution of participants across conditions.

Condition	Neutral Information	Offer	N	%
1	No	Consistent	100	24.9
2	No	Inconsistent	98	24.4
3	Yes	Consistent	102	25.4
4	Yes	Inconsistent	101	25.2

The results of this study support hypothesis 1.1.

Table 2. Percentage distribution of participants who made an offer that was consistent with the neutral information across scenarios.

Scenario	Experimental condition	Control condition	Chi-square
1	66.3%	58.6%	1.3, p=.25
2	59.6%	29.3%	18.9, p<.001
3	75.8%	12.1%	81.4, p<.001
4	35.4%	9.1%	19.8, p<.001

The offers that the subjects made were explored in more detail to detect differences between the experimental and the control groups. For three out of the four scenarios, the offers made by the control group differed significantly from the offers made by the experimental group.

Table 3. Mean, median and standard deviation of the offers made by the experimental and control groups across the four scenarios.

Scenario	Experimental condition			Control condition			Mann-Whitney U
	M	Mdn	SD	M	Mdn	SD	
1	506.7	500	119.3	473.7	500	135.9	4475, p=.09
2	189.9	100	150.8	270.1	250	162.3	3459.5, p<.001
3	107.8	100	32.5	58.2	50	66.4	2450.5, p<.001
4	2424.2	2250	990	3035.4	3000	1366.5	3244, p<.001

Hypothesis 1.2 also was supported by the results. Subjects assigned to the experimental group were significantly more likely to accept an offer that was consistent with the neutral information than subjects assigned to the control group ($c2=116.7$, $N=401$, $p<.001$).

Table 4. Percentage distribution of participants who accepted a consistent offer across scenarios.

Scenario	Experimental condition		Control condition		Chi-square
	Offer consistent	Offer inconsistent	Offer consistent	Offer inconsistent	
1	78%	46.9%	61.2%	50%	12.2, p<.05
2	60%	10.2%	30.6%	10%	41.5, p<.001
3	90.4%	40.4%	88.2%	91.7%	54.6, p<.001
4	51.9%	3.8%	19.6%	12.5%	39.6, p<.001

8 participants in the experimental condition who received offers that were consistent with the neutral information, did not accept any of the consistent offers. In addition, 3 participants in the experimental condition who received offers that were inconsistent with the neutral information accepted all inconsistent offers and 45 accepted one of the two inconsistent offers. This finding could be seen to suggest that fairness preferences of bargainers can prevail over neutral information about how others divide. One possible alternative explanation could be the nature of the sample (law students who participated in return for credits) and/or the setting (a computer room at the law school).

5.3 Study 2

5.3.1 Introduction

The main research question of the second experiment was whether bargaining behaviour was guided by transparency of general but concrete sharing rules and/or by transparency of general open-ended norms.

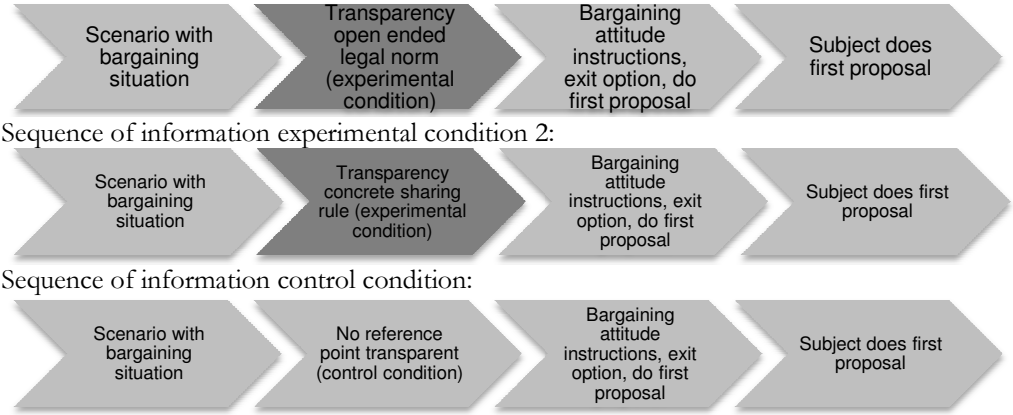
I tested the following three hypotheses:

Hypothesis 2.1: Transparency of general but concrete sharing rules guides first proposals of people in justiciable bargaining situations.

Hypothesis 2.2: Transparency of general open-ended norms guides first proposals of people in justiciable bargaining situations.

Hypothesis 2.3: Transparency of general but concrete sharing rules stronger guides first proposals of people in justiciable bargaining situations than transparency of general open-ended norms.

Sequence of information experimental condition 1:



5.3.2 Method

Participants
85 students from the Law faculty of Tilburg University participated in the study. The experiment was embedded in a course for second year students. Participation was compulsory. 54 (63.5%) subjects were female and 31 (36.5%) were male. The mean age was 22 years (SD = 2,1 years).

Design
Participants received three scenarios that described situations in which they had to agree with someone else on a distribution of value or damages. For all scenarios, subjects received instructions to make an offer to the other party. Participants were randomly assigned to one of three conditions. 29 (34.1%) of the subjects were assigned to the control condition, i.e. they did not receive any additional information that served as reference point for sharing. 30 (35.5%) participants were positioned in a situation with transparency of general open-ended norms. The remaining 26 (30.6%) participants were positioned in a situation with transparency of general but concrete sharing rules. These included information about a formula that is typically used in similar cases in order to determine a fair share.

The offers subjects made were the main dependent variable. Subjects received instructions to make a proposal from the perspective of someone who wants to find a reasonable solution, but not at all costs. They received information that they had an exit option, i.e. opening a court procedure, but that this could take significant additional time and that the outcome would be uncertain.

Procedure
Subjects were randomly assigned to the conditions. Each participant received a total of three scenarios that described situations in which value or damages needed to be shared. Participants received instructions to imagine that they were one of the parties involved in the conflict. Furthermore, they received the task to make a first offer.

Participants assigned to the sharing rules condition received a sharing rule for each scenario. The concrete sharing rules were designed in such a way that they were consistent with the properties of previous research literature that identified properties of objective criteria that make them useful as guidelines to negotiating parties (chapter 3). To give an example, one of the scenarios described a conflict about a student losing his weekend job due to relocation of the business. The duration of employment had been 5 years and the monthly salary was € 600. The sharing rule for this scenario stated that usually in these cases the employer would receive a compensation that is determined by multiplying the gross monthly salary by the number of years the employee worked for the employer. This formula is actually used for determination of severance payment in the Netherlands.

Participants assigned to the open norm condition did not receive this formula, but instead were told that if a judge decided in these cases he would take into account the age, employment market, salary, years of service and other relevant information when determining the amount of severance payment. Participants assigned to the control condition did not receive any additional information. After the scenario was presented (including the additional information in the experimental conditions), subjects were instructed to make an opening proposal to the other party by filling in a sum in an open entry field.

Measures
There was one independent variable: transparency of sharing rules vs. transparency of open-ended norms vs. no transparency of reference points.

The question whether or not proposals were guided by the reference point was measured on the basis of the consistency of the proposals with the outcome indicated by the reference point (hypothesis 2.1). In addition, I measured the variation of offers within groups (hypotheses 2.2 and 2.3).

Extreme bargaining behaviour was derived from the first offers. Offers that deviated much from the outcomes indicated by the sharing rules and other norms thus qualifies as extreme bargaining behaviour.

5.3.3 Results

The 85 participants were equally distributed across the three conditions. 29 (34.1%) of the subjects were assigned to the control condition, 26 (30.6%) participants were assigned to the open norm condition, and 30 (35.5%) participants were assigned to the sharing rules condition.

A chi-square test for overall consistency revealed a significant difference between the three conditions ($\chi 2=27.37$, N=85, $p<.001$). Separating the three scenarios revealed a significant difference for scenario 2 ($\chi 2=25.78$, N=85, $p<.001$) and scenario 3 ($\chi 2=16.14$, N=85, $p<.001$), but not for scenario 1 ($\chi 2=5.44$, N=85, $p=.07$). Participants assigned to the sharing rules condition

were more likely to make offers consistent with the sharing rule than subjects who received open norm information or no additional information. The results therefore support hypothesis 2.1 and hypothesis 2.2.

Table 6. Number and percentage distribution of participants who made an offer that was consistent with the neutral information across three scenarios.

Scenario	Control condition (N=29)	Open norm condition (N=26)	Sharing rules condition (N=30)
1	0	2 (7,7%)	5 (16.7%)
2	1 (3.4%)	2 (7,7%)	16 (53.3%)

Table 7 shows the spreading of the different conditions and scenarios. Only scenario 2 showed a significant difference in spreading between the sharing rules condition and the open norm condition, and between the sharing rules condition and the control condition. This means that – overall – hypothesis 2.3 should be rejected, but that the results of scenario 2 support it.

Table 7. Mean, median and standard deviation of the offers made by the experimental and control groups across the three scenarios.

Scenario	Control condition			Open norm condition			Sharing rule condition		
	M	Mdn	SD	M	Mdn	SD	M	Mdn	SD
1	2010,3	900	3742	1257,7	900	1344	1166,7	750	1304,7
2	1136,2	1000	692	1040,4	600	780,3	2610	3000	913,3
3	18586,2	17000	10756,3	14942,3	15000	7652,9	18469,7	18018	4485,2

5.4 Discussion and conclusion

The results from experiment 1 support the hypotheses 1) that people make offers that are consistent with the outcomes indicated by reference points that reflect how other people usually share and 2) that people are more inclined to accept offers that are consistent with such reference points. The results from experiment 2 support the hypotheses that 1) transparency of general but concrete sharing rules guides first proposals of people in justiciable bargaining situations and 2) transparency of general open-ended norms guides first proposals of people in justiciable bargaining situations.

This confirms the results of bargaining experiments and shows how reference points also guide bargaining behaviour in a dispute-like setting. The two experiments show that neutral information guides first proposals that people make when it comes to settling the distributive issues of a dispute. Interestingly, this result was found in both experiments. The first experiment simply presented the neutral information whereas the second experiment explicitly stated that this information was transparent, i.e. known to all involved and made the exit option salient. Further studies can focus on the effect of transparency versus privately

held information and the effect of salience of an exit option. This could help to establish the appropriateness of typical bargaining studies for dispute system design.

The results from both experiments indicate that the availability of neutral information guides behaviour when it comes to making offers or to accepting offers as part of distributive negotiations. This was found for 1) information that inform about how others usually share, 2) open norms and 3) sharing rules.

This study did not find significant differences between the different types of neutral information. The second experiment showed ambiguous results on the hypothesis that transparency of general but concrete sharing rules stronger guides first proposals of people in justiciable bargaining situations than transparency of general open-ended norms. In one of the two scenarios there indeed was a highly significant difference between the offers of subjects who received sharing rules and subjects who received open norms. However, event though there was a difference in the other scenario, this difference was not significant. Hence, the hypothesis that sharing rules provide stronger guidance needs to be rejected. The ambiguity of the results, however, indicates that further studies are desirable.

6 Four methods for systematically developing sharing rules

6.1 Objective criteria for fair sharing

"How much" issues in disputes can be difficult to settle. Sharing rules help, such as inheritance rules determining the fair shares of the properties that each family member in principle gets. In many situations of frequent conflict, the parties will look for such sharing rules in vain. One of the reasons for this is that they are costly to produce. In this study, I explore how sharing rules can be systematically developed and improved.

Dividing assets or establishing an amount of compensation is difficult because both parties depend on each other for reaching a settlement. Their relationship has been called a bilateral monopoly, implying that they are stuck with each other in a game of power. Bargaining research has shown that negotiations are often complicated because it pays to come with extreme offers, to delay and to stick to your bid. So the probability of a stalemate is high. On top of that, people tend to be biased when they bargain. In this setting, sharing rules can help to come to a fair solution.

Sharing rules are concrete rules that indicate what a fair share can look like. They are guidelines with a number in them for determining quantities. An example would be a formula that states that taking one gross monthly salary per year worked is a reasonable compensation in the case of dismissal. Another example would be guidelines that indicate a concrete amount to be received for a specific personal injury claim.

Sharing rules thus can be used as objective criteria for settling distributive issues. As such, they help to bring neutrality. They provide an external perspective in a dependency relationship. This helps to reduce the effects of power differences. As neutral anchors and references, they manage expectations and enable objective evaluation of offers. And the sharing behaviour of others is found to be attractive to follow.

Legislators, judges, lawyers and other professionals that create rules often have no incentives to develop sharing rules. Consequently, many distributive issues lack sharing rules. Some countries still do not have practical guidelines for determining the amount of child support that give disputants a clear idea of what is reasonable. Clear guidance for personal injury claims relating to loss of earning capacity are very scarcely found.

People who do in fact develop a sharing rule that facilitates settlement of many disputes do not get rewarded for this. Instead, they expose themselves to heavy criticism. In addition, developing sharing rules can be costly. At the same time it is very easy to copy them once they are published. Consequently, it is difficult to

recover the development costs. This makes developing sharing rules an unattractive activity. One could argue that this typically is a public good that the government needs to deliver. But ministries of justice often lack the resources needed for these private law issues and might be reluctant for the same reason of exposure to criticism. There seems to be little political rewards for the development of sharing rules.

Guidelines that help to come to a concrete number as an outcome typically are not part of legal research either. Maybe this is because its nature is not seen as a technical legal issue. Determining how much parties should pay is perhaps seen as a matter of establishing facts. At the same time, developing legal rules on the basis of prior outcomes is a core activity in legal research. Legal commentators derive rules from case law. But this legal research usually only focuses on rules that steer conduct. The law grants judges discretionary power when it comes to determining quantities. Quantities are determined on the basis of criteria such as fairness, justness and reasonableness. It requires craftsmanship to arrive at a concrete number that is not only acceptable but also fair. Judges are the expert professionals whom we trust to be able to do this. Case law, however, is not a rich source for detailed justifications of quantities. Usually, specific circumstances of the case are mentioned together with a number.

Although quantitative issues are not a hot topic in legal research, there are some legal domains that focus on this. Jurimetrics, for example, is a discipline that focuses on a quantitative approach to developing rules. Its aim is to develop formulas and other rules that help to concretely predict legal outcomes. Quantitative text analysis is a method typically used for this. By analysing court decisions, implicit rules can become explicit. However, jurimetrics research indeed uses quantitative methods; it does not focus on quantitative issues a lot, as a recent overview paper (Hall & Wright, 2008) shows. Studies typically focus on questions like: Who uses fee-shifting provisions of the Equal Access to Justice Act (Mezey & Olson, 1993)? How do cases with published opinions differ from those without (Donohue & Siegelman, 1990)? Why do judges interpret statutes the way they do (Epstein, Staudt, & Wiedenbeck, 2003)? Even though their focus is different, the methods used in traditional legal research and in jurimetrics research can inform sharing rules development. Its qualitative and quantitative methods for analysing text can be applied to quantitative legal issues (the "how much" issues) and thus might be useful for developing sharing rules.

Other literatures may provide input for development methodologies for sharing rules as well. I reviewed literature and selected two types of studies. First, I selected studies that focus on outcomes people generally get. Second, I selected studies about the development of rules of thumb. These literatures sometimes described methods that can be used for establishing quantities and developing rules of thumb. As such, they could inform sharing rules development.

In addition, I reviewed examples of sharing rules from practice. This review resulted in the four methods for developing sharing rules that are described in section 6.2.

Sharing rules can be refined and made better. In Chapters 2, 3 and 4, I identified three criteria for defining usefulness of sharing rules:

- The extent in which they reflect practice (Chapter 2)
- The extent in which they are useful for dispute resolution (Chapter 3)
- The extent in which they are consistent with basic criteria for outcome justice (Chapter 4)

In section 6.3, I describe a process for gradually developing better sharing rules on the basis of these criteria. The building blocks for this process come from the domain of evidence-based practice, especially evidence-based medicine and health care. In these domains, working with decision rules, guidelines and other tools increasingly became common. These types of evidence-based protocols often are developed, put to small-scale practice in a more controlled environment and as such become part of a learning process. They are gradually but systematically tested and improved. This enables practitioners, clients and policy makers to benefit from the best available evidence (for impact on objective and subjective health as well as costs and risks) in their practice. Although no rigid process seems to have emerged, best practices for such a development process exist. The process for developing, refining and improving sharing rules builds on these best practices.

After a summary of the methodologies and an indication of their strengths and weaknesses, in section 6.4, I explore the bottlenecks that prevent people and institutions from developing and improving sharing rules. In addition, I provide recommendations for coping with these.

6.2 Methodologies for developing objective criteria

6.2.1 Using statistical analyses

The experiences from a large number of prior cases can be used to statistically derive a sharing rule from a data set. This can be done, for example, by using a regression analysis. The amount of child support a father needs to pay can be related to his monthly income. This can lead to a formula-type of guideline for determining the amount of child support in the future. When there are data about other relevant factors, it is possible to determine which best explains the results.

Data that might influence the level of child support can be collected from case law or case files. Expert interviews can provide a first indication of the data needed. The list of factors below was established through interviews with experts from the family law section at Tilburg Law School.

1. Date filing divorce	2. Date court decision	3. Date of birth: husband	4. Date of birth: wife
5. Date of marriage	6. Receiving party	7. Years married	8. Number of children before divorce
9. Dates of birth: children	10. Gross yearly income during marriage: paying party	11. Gross yearly income during marriage: receiving party	12. Special costs: children
13. Costs of alimony: paying partner, previous marriage	14. Costs of child-support: paying partner, children of previous marriage	15. Current gross yearly income: paying partner	16. Current gross yearly income: receiving partner
17. If applicable: current gross yearly income, new partner of paying partner	18. If applicable: current gross yearly income, new partner of receiving partner	19. Amount of child support decided upon specified per child	20. Specified special circumstances taken into account
21. Number of days per week spent by each child with paying partner	22. Number of nights per week spent by each child with paying partner		

Research assistants used this list with critical factors to collect data from 200 court files that dealt with determining child support at the family division of a Dutch court. The court granted access to about 500 paper files. The research assistants had no control as to which files were provided. These files were selected from the storage room and delivered by the court staff. The only selection criterion was that the decision was not older than five years. Files were screened (some files that did not deal with determining child support) and data was collected until a data set reflecting 200 cases was developed. None of the examined files contained data on all of the factors from the list. Only 51 files provided for data about the number of children involved the current gross annual income of both of the parties or the gross annual income during marriage of both of the partners (which we took as a replacement in case the current incomes were missing).

Descriptive Statistics			
	Meant	Std. Deviation	N
Child support per year	3,990	3,580	51
Number of children	1.67	0.816	51
Gross income of paying party during marriage	25,700	14,900	51
Gross income of receiving party during marriage	14,170	23,050	51
Current gross income of paying party (if missing: gross income during marriage)	25,200	14,700	51
Current gross income of receiving party (if missing: gross income during marriage)	14,630	22,930	51

This lack of sufficient data can be explained by the nature of the procedures before the family court on the Netherlands (adversarial). Probably, many of the parties have not—adequately—rebutted claims made by the other party (for instance, about the amount of child support to be paid). Even though there are — sophisticated — guidelines for child support in The Netherlands, judges have no reason to ask for more information to actually apply these whenever a party does not contest the claims made by the other. Consequently, the court files often end up with only a final amount.

A regression analysis through the data from the 51 files showed that it is possible to develop a formula for determining the amount of child support per year in euro:

> (795 * number of children) + (0.159 * gross income of paying party during marriage) + (0.204 * gross income of receiving party during marriage) + (0,026 * current gross income of paying party) + (0.226 * current gross income of receiving party) – 1,656

This formula predicts the amount of child support within an error margin of 1,250 euro per year in 40 out of 51 cases. This still leaves quite a range, since the deviation of the indicated amount can be either about €100 per month more or less than the amounts from the data set. The formula can be presented as representing at least 40 case decisions by a Dutch court. Of course, this number can grow if more data is fed into the analyses, although the formula probably changes then as well.

Example:

- 3 children;
- partner A had a gross annual income of €40,000 during the marriage;
- partner B had a gross annual income of €10,000 during the marriage;
- partner A's current income is €40,000;
- partner B's current income is €15,000;

According to this formula, the annual amount of child support is:

$$-1{,}656 + (795 * 3) + (0.159 * 40{,}000) + (0.204 * 10{,}000) + (0.026 * 40{,}000) + (0.226 * 15{,}000) = 12{,}383.90$$

Given the error margin of €1,250, according to this formula, the total amount of child support (i.e., for the three children together) is somewhere between €11,133.90 – €13,633.90, which comes down to a monthly amount between €927.83 – €1,136.16. This comes down to about 350 euro per child and is roughly 30% of the gross annual income of the paying partner.

If there is a good data set, deriving a sharing rule requires relatively straightforward analyses. One study illustrates this. It focuses on the amount of compensation people get when a New York City agency seizes their private property for public use (Chang, 2010). For each individual case, it compared the compensation paid for the condemnation with the fair market value of a property (the value based on the highest and best use at the time of settlement, despite the actual use). The aggregated data were used to develop more generally applicable sharing rules that help owners to determine what they can expect in the future. This study showed that the average compensation paid for lower value properties was 90% of the fair market value, the average compensation for higher value properties was 120%, and the compensation for middle value properties typically was consistent with the market value.

The examples show that the sharing rules this method produces have some useful characteristics. The formula that results from it is objectively applicable. The basic requirements are rich data sets. Gross annual income over the past year and fair market value are issues that people can disagree upon but only to a limited extent. Moreover, they are things that can be objectively established on the basis of salary slips, tax documentation, real estate data, etc. This makes these sharing rules objective and also practical to apply.

Another strength of this method is the fact that it guarantees sharing rules that reflect practice to a large extent. Since they are developed on the basis of a set of data from a large number of prior cases, aggregating experiences, they allow people to develop a clear understanding of the sharing that takes place normally. So they get an indication of what others usually get in a similar situation.

A bandwidth like in the example of child support makes it possible to tailor the outcome. It allows parties to take into account specific circumstances of their case whilst still providing a limited framework. This helps to give parties the feeling that justice is done to their specific case.

One downside of the produced formulas is that it might be somewhat alienating. People are not used to thinking of justice and fairness in terms of formulas. Ratios with detailed decimals, the need for multiplication and subtraction, etc., are very different from common legal rules. It might be difficult to understand how such a formula relates to a fair share. Thus, in the eyes of disputants, perceived lack of legitimacy might be an issue. People might not have the feeling that these formulas and shares really belong to them or reflect how they feel about what a fair share is.

The costs for developing sharing rules using this method are rather high. Primarily because getting access to sufficiently rich data is a challenge. Data sets are scarce. Case files are often not publicly available. Moreover, they are not organized in such a way that they can be used as a data set. Developing data sets is challenging. It requires a large number of cases. A rule of thumb for determining an appropriate sample size for regression analysis is that at least 50 cases need to be included for each independent variable that is part of the regression analysis (VanVoorhis & Morgan, 2001). This adds up to many cases, as the example of child support shows. The list presented in the above started from 21 independent variables. This means that data from 1050 cases are needed to have reliable results. It took a team of four research assistants about three weeks to collect the data for the example of child support. And they found that from the 200 out of 500 files that met the selection criteria, none provided all the data that were needed. Only 51 files provided data on the limited number of factors that were absolutely needed. This shows how collecting rich enough data from a sufficient number of cases will be challenging. Data sets should not only have data from a sufficient number of cases. The cases that should be included, ideally, provide a representative sample. This makes it more difficult to develop a data set and increases the costs associated with this development method.

Courts usually publish decisions according to criteria that prevent routine-like decisions from being published. Cases that deviate from a rule rather than confirm a rule get published. This is understandable as publishing costs money. A side effect is that it skews the data since more exceptional cases are overrepresented. In addition, cases themselves might be incomplete. It is possible that they suffer from incompleteness and only reflect the circumstances that support the decision, because judges might primarily be concerned with justifying the decision (Hall & Wright, 2008), although for distributive issues, this concern might be less urgent.

6.2.2 Inducing sharing rules from a limited number of cases

Developing sharing rules from a limited amount of case outcomes is also possible. This overcomes the challenge of having to develop large data sets. A selection of, for example, 10 cases might already show a pattern. This pattern can be used to develop a sharing rule.An example of such a list is a Dutch guide called the "Smartengeldgids" in which summaries of cases with non-pecuniary damages are listed. This guide contains a collection of case law for different types of damages. It is divided into several sections that enable the reader to look for different patterns in different ways. The summaries and outcomes are categorized on the basis of the cause of the damages (accident, violence, etc.), and type of injury that the damages are associated with (eye injury, injury to head, brains and nerves, injury resulting from rape, etc.). In addition, the information is organized in four columns indicating: A) the unique number for referral; B) the damages rewarded and claimed (original sum plus indexed sum); C) the source; and D) a short description. Example for injury of shoulder, chest and spine (translated excerpt from 15th edition):

Unique number	A) Rewarded (& claimed) damages; B) Sustained damages	Source	Nature of injury
312	A €227 (€340) B €268	Amsterdam court, May 12 1997, # 96/2086	Car driver. Hit by a car that was not given priority. Six weeks of headache and pain in the neck.
313	A €227 (€340) B €261	Almelo court, January 21 1998, #97/253	German woman. Passenger in a car who got hit from the back while making a right turn. Hospitalized for a week, and had serious headache and pain in the neck for four weeks.
314	A €272 (€???[7]) B €313	Den Haag court, March 18, 1998, #95/3443	Man, 78 years old. Collision between two cars. The car of the person who caused it was not insured. Injury was subdermal bleeding on the head and a bruised shoulder.
315	A €454 (€454) B €545	Den Bosch court, January 19 1996, #94/1996	Man. Has bruised ribs as a result of a car accident and has suffered pain for three months.

[7] Claimed damages unknown

The guide is used in practice to find more objective criteria for determining what a reasonable amount of damages is. Such lists of concise summaries that mention concrete and decisive factors and outcomes are similar to the so-called "comparables" that are being used in the housing market. Real estate brokers do not have formulas to determine the market price of a house. They simply rely on a list of more or less comparable houses and features: type of house (apartment, family house, etc.), location, size, number of rooms, garden space, etc. From the pattern that this list shows, they establish what the value of a house is. This pattern, however, can also be used to develop a sharing rule. As such, drafting such a list is the first step that is needed for developing sharing rules according to this method.

The above example is not a sharing rule, i.e., a general but concrete rule to determine an amount. Rather, it is a big collection of cases, neatly categorized so that it is relatively easy to find similar cases. The organization of the information already might help to get quickly informed about the amount of compensation that has been awarded in the past in such a comparable case.

A step towards development of a sharing rule from such lists is to analyse how the different decisive factors affect the amount in the outcome, by building on the pattern that the collection of cases shows. The table with the data on non-pecuniary damages reflects a couple of variables. First of all, it defines the type of injury that causes the non-pecuniary damages; in this case, shoulder, chest and spine injuries. Second, it shows the amount of compensation asked for and rewarded. Third, it mentions the period during which the victim suffered from the injury. These all can be variables in a formula or guideline.

Consider the following cases from the European Court of Human Rights. All these cases are about the right to a fair trial (article 6 ECHR). If the length of proceedings is unreasonably long, applicants can get rewarded compensation for non-pecuniary damages. The rule of thumb is that applicants get rewarded €1.000–1.500 per year for the length of time that the proceeding takes. This amount can be adjusted depending on specific circumstances. The ECHR has mentioned several factors that can justify such adjustments (Chamber judgment of 10 November 2004 in Apicella v. Italy). One is that more courts have been involved. Others are the value of the case or whether the proceedings were delayed due to conduct of the applicant. There are no guidelines, however, as to how this exactly can be done. A straightforward analysis of case law can help develop such a guideline.

To illustrate how to start this, consider the following non-criminal cases in which the ECHR declared that the proceedings were of unreasonable length and rewarded compensation for non-pecuniary damages. The table below shows a small selection of cases where the ECHR awarded non-pecuniary damages for which the abovementioend rule of thumb was applicable. For each of these cases, the table presents the values for some of the specific circumstances that were mentioned in the Apicella v. Italy judgments.

Case	Duration proceedings	Number of courts	Non-pecuniary damage	Per year
CASE OF LAPPALAINEN v. FINLAND (Application no. 22175/06)	6	3	1.500	250
CASE OF CHRAPKOVÁ v. SLOVAKIA (Application no. 21806/05)	12	3	2.380	198
CASE OF SCHWARTZ AND OTHERS v. HUNGARY (Application no. 5766/05)	14	2	12.800	976
CASE OF WOLFGÉHER AND TURULA v. HUNGARY (Application no. 36739/05)	10	2	8.000	800
CASE OF SCHWARTZ v. HUNGARY (Application no. 25073/05)	9	2	5.600	622

The average per year is about 570 euro. When the case has been before two courts the average compensation per year for non-pecuniary damages is approximately 800 euro. If three courts have been involved, the average compensation per year is 225 euro. More cases can be added so numbers are created that more reliably reflect practice. The guideline also can be refined. This is a matter of adding more variables that are likely to influence the amount of compensation. For instance, factors relating to specific conduct of the applicants, value of the original cases, etc.

The following example illustrates how more refined and robust sharing rules can be developed. It focuses on the issue of how to determine compensation in case of dismissal in the Netherlands. A commission of judges drafted guidelines for this, including a formula for calculating a reasonable amount of compensation.

This formula states that compensation is one gross monthly salary for each (weighted) year worked. The resulting sum should be multiplied with factor C. This factor in principle is 1 but can be lower or higher according to circumstances. The formula can be refined by integrating data about what makes C higher or lower; for instance, by adding that C can have value 2 if the employer did not offer a reintegration trajectory and communicated badly about this with the employee. Gradually a more sophisticated and refined rule can be created, such as in the following.

In case of a disturbed relationship between the employer and the employee, C has a value 0,5 if:

- this is caused by both the employer and the employee, but the employee has shown to be unwilling to adapt to changes in the organization;
- the employee did not perform well on the job;
- the employer has caused damage to the reputation of the employee among his peers by disclosing information about his criminal records from the past; or
- the employee has lied about having certain diplomas and the employer has been insufficient in checking this.

One study made a qualitative analysis of published case law on compensation and dismissal from the years 2003–2008 (Bergh, Siesling, & Rijs, 2009). This shows how this can be done. Three hundred and twelve cases were reviewed, in an attempt to look for lower values of C that were mentioned and the reasons that were given for this. Fourteen percent of the reviewed cases involved a lower C factor (<0.8). The most common reasons that can be attributed to the employee that were mentioned in the decisions were:

- bad communication of the employee towards the employer;
- violations of company rules;
- criminal or inappropriate behaviour; and
- inadequate job performance.

The most commonly mentioned factors that caused the value of C to be higher (1.20) that can be attributed to the employer are:

- bad communication of the employer towards the employee;
- bad labour relationship due to the employer; and
- bad functioning as employer (in relation to reintegration trajectory).

The usefulness of the sharing rules resulting from this method produces varies. For example, the extent in which the sharing rules can be applied objectively can be very different for different sharing rules. The example of the compensation of non-pecuniary damages in the case of overly lengthy procedures shows how sometimes rather exact numbers can be yielded. Such figures are easy to apply

and very practical. The example of compensation in the case of dismissal, however, is an example of a sharing rule that is less objective. For instance, what exactly constitutes bad communication from the employee towards the employer? It is easy to have a different perspective on this. It also shows, however, how such a sharing rule can be refined by adding concrete examples that qualified as bad communication in case law. Then, the sharing rule can be applied more objectively.

If a sharing rule is derived from 10 cases, it is impossible to tell whether these 10 cases are representative or not. They might be outliers. It is difficult to tell. So we also cannot determine the extent in which the sharing rule reflects practice. Consequently, if a sharing rule reflects a limited number of exceptions rather than the general rule, it will become a less legitimate way for sharing.

Legitimacy, however, might increase, as this method resembles the common approach of lawyers. It is a way to develop guidelines similar to how rules are commonly defined. Legal commentators often write case notes in which they summarise and systematise cases in order to identify more generally applicable rules. With each new important decision the rule is refined, tested and improved. This approach does the same. The only difference is that it does not focus on legal doctrine and theory, but on issues of dividing value, damages, tasks, etc. Every case that is added to this analysis can increase legitimacy.

The costs for developing sharing rules in this way are limited and at least incrementally experienced. A pattern shown by one limited set of cases can be a starting point. Collecting these will be easy and not too costly. However, in order to come to a sharing rule that reflects practice, it is necessary to—gradually—add more cases. And to subsequently refine and adjust. This will increase costs. A comprehensive study like the example of compensation in case of dismissal will especially be very costly. Still, limited resources are needed to start working with this.

6.2.3 Explicating tacit knowledge in focus groups

Several studies show that dispute resolution professionals develop routines and heuristics just like other professionals do (Bainbridge & Gulati, 2002; Guthrie, Rachlinski, & Wistrich, 2002, 2007; Kesting & Smolinski, 2007). It helps to deal with real-life restraints like having limited time and information available (Gigerenzer & Todd, 1999). Such know-how typically is not written down and people often are unaware of their knowledge. Dispute resolution professionals that frequently deal with similar distributive issues are likely to develop rules of thumb that might remain implicit as well. This tacit knowledge is a potentially rich source for developing sharing rules as it consists of accumulated knowledge from many cases.

There are some methods that help to explicate this type of knowledge. It proved possible to elicit tacit knowledge and rules of thumb by simply asking experts

and let them reflect on the rules of thumb they use (André, Borgquist, Foldevi, & Mölstad, 2002). They may not be aware they even use rules of thumb so it does require good facilitation and experts might need to be encouraged to reflect.

In two research projects, I used this method to develop sharing rules for determining child support. Firstly, I used the method as part of a microjustice project in Nairobi, Kenya. This project focuses on developing effective legal information strategies. Secondly, I used the method as part of a research project in Cairo, Egypt that aimed to describe practices of different types of dispute resolution professionals. In both projects, I organised expert focus groups. In Nairobi, the experts were six advocates working for a local legal aid organization. Most of the experience of these advocates was in family issues, employment issues and land issues. In Cairo, the experts were five traditional adjudicators (so-called muhakim, kébir and khadis). These adjudicators deal with the most common issues, like domestic issues, neighbour issues, land issues, family issues, etc.

The focus group studies in Nairobi and Cairo had a similar design and conduct. During sessions of four hours, the experts were asked about common legal problems that they dealt with, how they deal with them and what the challenges and successes in their work are. Both in the Nairobi as in the Cairo study, the participants were asked about sharing rules for determining child support and maintenance money. They were asked to define a rule that can be applied objectively. In others words, if the rule would be applied by someone else, this person would arrive at the same outcome, with the same amount of child support and maintenance money. Neither Kenya nor Egypt has already established sharing rules for determining maintenance money.

All participants initially were rather sceptical about the possibility of defining a sharing rule. The design anticipated this. Determining outcomes on the basis of all circumstances of a concrete situation is what lawyers learn to do. Thus, the participants had to indicate a common profession that a typical inhabitant of their country could have. In both sessions, taxi drivers were mentioned as a representative profession. Next, the participants had to think about the common salary for a taxi driver, the average number of children, the costs for taking care of them, etc. These questions helped to develop a scenario for a common situation. After this was done, the experts had to indicate what the appropriate amount of child support was. The experts did not find this difficult to do and consensus was reached rather quickly.

After participants gave a figure, the circumstances in the scenario were changed. Again, participants had to indicate the appropriate amount. If the monthly income initially was set at 30,000 KES and the amount of child support at 11.000 KES, they had to give the appropriate amount for the situation in which when the monthly income is 60,000 or 100,000 KES. This exercise resulted into the following rules of thumb for child support:

Amount of child support in Nairobi:

After a divorce or split up, both of the parents remain financially responsible for raising the children (costs for food, housing, clothing, education, medical, etc.). It is common, especially for younger children, that the mother gets custody. The father then pays maintenance money (child support). Usually this is 30%–50% of his monthly income. This rule of thumb is built on the following examples:

Example 1
Husband's profession is taxi driver. He makes 30.000 KES per month. The wife took care of the children and has no job. They have two children, one of which goes to school.

Costs:

- Rent: 5.000-10.000 KES per month
- Public school fee: 1.000 KES per month
- Food: 5000 KES per month

Total per month: 11.000–16.000 KES

In case of higher-level incomes, first maintenance money for the children is determined. Often, enough remains for maintenance money for the ex-wife (partner alimony). Usually, this is 20–25% of the remaining income (after subtraction of child support).

Example 2
Husband is a local politician. Officially, he makes 800.000 KES per month. The wife took care of the children and has no job. They have three children.

Maintenance per month for the children: 270.000–400.000 KES
Maintenance per month for the wife: 100.000–120.000 KES

Following the new Constitution for Kenya, maintenance money needs to be paid for children born both in and outside of marriage.

Amount of maintenance money in Cairo

Husband's profession is taxi driver. He makes 1000 LE per month. The wife took care of the children and has no job. They have three children of which one goes to school.

Maintenance money: at least half of the sum for three children and their mother. There is a maximum limit for maintenance. Even if the expenses for children exceed 500 LE, 50% of the father's income would be the maximum limit. Alternatively, 30% would be the minimum. But in some exceptional cases, a

minimum of 15% has been approved by court verdict.
Costs:

- Daily expenses for one kid in daycare is 5 LE a day, 100 LE a month (average)
- Health care and medical services would be 200 LE
- Clothes (for winter and summer, twice a year, separately) would be 500 LE in total a year

Important questions and circumstances are:

- Does the father have to take care of his parents?
- Age of children? (School? Work?)
- Where do they live: village or city? In the village the wife would live with her parents, and her parents would take care of her, so the main focus would be on only maintenance for the children.
- If he had one child? Still, the max would be 50% and the minimum would be 30%.

The examples produced during the focus groups in Cairo and Nairobi show how the results of this method can be very practical. They are percentages of facts that can be relatively simple and objectively established. And since the experts gave bandwidths it is also suitable for tailoring the outcome to the specific circumstances. Of course, in focus groups it is also easy to specifically ask for bandwidths.

The strength of this method is that it provides direct access to information about a part of practice that usually remains hidden. Most of the disputes that get a solution get one through settlement, rather than adjudication. This methodology can produce sharing rules that are used in the practice of settlement. So it has the potential to yield sharing rules that really tell parties how the majority of people share in practice.

The legitimacy of the sharing rules produced will partly depend on the extent in which the sharing rules reflect practice. The more experts confirm that this sharing rule indeed indicate how quantities actually are determined, the higher the legitimacy. So it helps if a larger number of focus groups are organized.

This can also help to reduce the risk of groupthink. The dynamics in a focus group can help the experts to reflect and develop insights about their tacit knowledge but focus groups also bear the risk of groupthink. One dominant idea or person can take over the group. The group can get carried away and create its own reality. Organising a series of focus groups, however, can reduce the risks of groupthink. The best practice in this respect is that at least three focus groups are organised (Krueger & Casey, 2000). If the results are stable across these three focus group sessions, this is an indication of reliability, but of course, more focus groups are better.

One concern is that this methodology has to rely on the willingness of experts to cooperate. First of all, there might be resistance among experts against the idea of rules of thumb for determining amounts. Much of the legal education and practice builds on the notion that justice is tailor made and that legal services and assistance should be bespoke. Hence, sharing rules that hinge towards standardisation might not be accepted as an idea, despite the fact that studies show that legal experts use them as well.

When it is problematic to find a group of professionals willing to cooperate, interviews can be an alternative. They can be used to urge experts to reflect on how they determine amounts. Downsides are that this requires more resources and that the group dynamics and interaction between experts is lacking. Questioning each other and responding to each other's reflections can be useful for explicating objective criteria they use unconsciously. On the other hand, individual interviews do allow more personalised strategies to let experts reflect. The interviewer can be more on top of things and is better able to ask multiple follow-up questions in a one-on-one setting. This might compensate for the lack of group dynamics.

6.2.4 Collecting criteria through surveys

The ability to reflect on sharing rules might also depend on the type of issue. Legal professionals might find it easier to reflect on certain sharing rules they use and difficult on others. The level of awareness about how they determine amounts can vary per issue. And there probably are differences between the capabilities of experts. Some experts might be more reflective than others. Some might be able to promptly explicate rules of thumb when they are asked for them whereas others might lack this skill entirely. This does create potential to use a method that is commonly used by scholars who work in the area of comparative law. Surveys to ask for rules, norms and criteria are used and generally accepted as a method for data collection in this domain.[8]

I tested the survey methodology in Kenya and conducted a survey study among 29 Kenyan lawyers and judges. The questionnaire had 40 items. Each item invited the expert to write down the sharing rule for a specific and narrowly defined distributive issue. The questionnaire included items related to family issues (including child support, visiting arrangements, division of properties, but also inheritance, etc.), to employment issues (including reasonable salaries, compensation in case of termination of employment, etc.), landlord-tenant issues (compensation in case of eviction, notice period, etc.), and other. The questions were open-ended and the respondents had to write down the rules and norms that applied according to them.

[8] See, for instance, the reports that the International Academy of Comparative Law publishes: http://www.iuscomparatum.org/141_p_1569/publications.html

In the introduction to the questionnaire, the experts were told that the goal of the study was to find out what rules of thumb experts use in practice. Respondents were encouraged to reflect upon the issues by providing clear examples that the study looked for. For example:

> *How can partners divide the financial burden of raising children after divorce or separation?*
>
> *Example: parent where child lives pays daily expenses. Other expenses are set at % of joint income, determined by formula depending on age and number of children. Both parents contribute in proportion to income.*

As was expected, the answers showed a lot of variance. The majority of the respondents provided general answers stating that it depends on what courts decide or on income. However, this question yielded some concrete and practical answers like:

> *The person who is given custody is to pay 60% of the daily expenses, 10% of education, 50% of medical care, and 15% of costs for clothing.*

Indeed, some experts seem to be able to reflect upon their work and describe the sharing rules they use. But the study did not yield a frequently mentioned sharing rule. Even answers to questions about issues for which there are formulas in Kenya showed large variance. Consider this selection of answers to the question of how an employer and employee can establish compensation for the employee if the employer terminates the agreement:

- *30 days for every year will be in order. But the income of the employer matters.*
- *Should be legally determined in accordance with the terms of employment.*
- *50 percent of monthly salary.*
- *The Employment Act 2007 as well as Labour Relations Act 2007 makes provision for that.*
- *15 days times the numbers of years worked.*
- *They should be able to get recourse from the courts but 20% of monthly salary will be a better place to begin.*
- *6 months salary.*

Most of the answers are not consistent with Section 40(1)(g) of the Employment Act 2007 of Kenya. This section clearly states that in case of termination of contract, the employee has a right to a compensation of 15 days salary for each completed year worked.

There can be several reasons for this. A positive one can be that in practice, various other rules of thumb might be used than the ones that are mentioned in

legislation. It is more often observed that competing sharing rules are used in practice. Another, less positive reason can be that practice shows huge inconsistency or the respondents have too little knowledge and expertise of the issues the sharing rule was asked for.

The usefulness of the results yielded in the example studies is limited for another reason. Although some expert respondents provided some very practical, clear and concrete answers, other respondents confirmed none of the answers. Consequently, it is difficult to assess the extent in which the responses are reliable in the sense that they really indicate sharing in practice.

This inconsistency of the answers is a risk of this methodology. As opposed to the focus group and interview methodology, there is no way of finding out how sure respondents are about their answers. Of course, a question asking them about this can be included after each item, but this would make the questionnaire too lengthy. In addition, in a survey study, there also is no check by peer experts. A study that has focus groups during which the results of a survey are discussed might be able to tackle this.

6.3 What can a process of continuous development, improvement and refinement look like?

Each of the methodologies discussed can be starting points in a continuous process of developing, improving, refining and updating sharing rules. In this section, I discuss what such a continuous learning process can look like. The process that is sketched builds on the best practices that are developed in the domain of evidence-based practice.

In health care and nursing, management, education, and other human services domains, a practice of developing guidelines and rules that support decision-making has developed. This is referred to as evidence-based practice (Trinder & Reynolds, 2000). These rules aim to support the actions of practitioners to work towards decisions and interventions that work and move away from decision-making on a strictly intuitive, case-by-case basis (Rycroft-Malone et al., 2004). They enable building on prior experiences and research data that have been critically and publicly scrutinized (Rycroft-Malone et al., 2004). Even though no rigid methodology exists, best practices have emerged for developing these decision rules. These best practices can be used to design a similar process for sharing rules, formulas, guidelines and other objective criteria for fair sharing.

The evidence-based approach emerged from the field of medicine. It has been adopted in areas like health care (encompassing medicine, psychiatry, nursing, etc.), management, education, and development economics (Banerjee, Duflo, & Glaeser, 2011; Trinder & Reynolds, 2000). Evidence-based medicine is probably the domain that is developed best. Here, decision rules allow practitioners to make a diagnosis on the basis of a few indicators. Accordingly, they can

determine which intervention is most appropriate. This also allows practitioners to clearly communicate how the diagnosis is established, what the chances of success of a treatment are, what side effects and experiences can be expected, what the risks are, etc.

There are various types of evidence that can be used. Evidence-based practice can be based on data from research, practitioners, clients or other stakeholders. Study designs that randomly assign subjects to an experimental or control group that each receives a different intervention (Randomized controlled trials, RCTs) are in some respects considered to be the golden standard, i.e., yielding the most robust and critical evidence.

However, the essence of evidence-based practice is that the current best evidence (which can be all types of evidence ranging from RCTs to individual case reports) is conscientiously, explicitly and judiciously used to rationalize policy and actions of practitioners (Bhandari & Giannoudis, 2006; Concato, Shah, & Horwitz, 2000; Sackett & Wennberg, 1997). What the current best evidence is and how it can be developed depends on both the discipline involved (Upshur, VanDenKerkhof, & Goel, 2001) and the question that has to be answered (Sackett & Wennberg, 1997). Furthermore, evidence bases will evolve as new practices are gradually developed and at the same time applied (with a feedback loop). Crucial in this respect is transparency of the quality of evidence (Guyatt et al., 2008) so practitioners can critically appraise it themselves and on the basis of this consider using it (Guyatt & Busse, 2006).

RCTs are known for being able to yield robust data. They, however, might not be appropriate for answering all questions. For instance, the costs and efficiency of the treatment or the user friendliness of certain interventions for practitioners would be difficult to assess in regards to the impact on the patients' satisfaction and experiences. In the health care literature, they hence distinguish different sources of evidence that together provide a more complete picture. In general, some distinguish practice-based evidence and research-based evidence (Rycroft-Malone et al., 2004). The first indicates reports with data from practitioners or patients that work with specific rules and protocols. The latter indicates study reports from rigorous laboratory-based studies, or more controlled clinical experiments. Each source might require a different methodology. These sources can also guide efforts towards making sharing rules evidence based. We can evaluate the impact of sharing rules on issues that matter to disputants when it comes to fair sharing. Each of these sources and methodologies can provide information about different aspects of the validity of objective criteria. As such, every piece of information can contribute to developing an evidence base.

It is possible to develop evidence for issues that people find important when it comes to distributive issues. This helps to create a situation that is similar to how health care practitioners inform clients about different treatments that are available. For each treatment, an indication of the expected results is considered in terms of getting cured and the potential side effects and risks. This can help

disputants to make an informed cost-benefit analysis. It is possible to examine the extent in which sharing rules reflect practices of sharing. So people are better able to get a share similar to others. Gradually, sharing rules can also be assessed by an increasing number of professionals who can endorse the sharing rule on the basis of their experiences and expertise. The usefulness for dividing value can also be evaluated. Sharing rules can be refined so they can be applied more objectively. Also, more and more exceptions to the general rule can be integrated by adding more variables to the rule. The extent in which sharing rules result in outcomes that people will experience as just can be exposed, by analysing the extent in which they reflect basic criteria for outcome justice that empirical research has found to be used by people (Gramatikov, Barendrecht, & Verdonschot, 2008a).

The following table gives a brief description of each source, and some examples of research questions and corresponding methodologies.

Methods for testing, improving, refining sharing rules		
Source	**Question**	**Methodology**
Research: Data from research literatures	What are the effects of transparency of sharing rules on negotiated outcomes?	Desk Research, Case Law Analysis, Experiment, Randomized Controlled Trial
Practitioners: Data obtained through practitioners like lawyers, judges, paralegals, police, etc.	What is a common amount paid to a personal injury victim for loss of income?	Case Report, Focus Groups, Interviews
Clients: Data obtained through (potential) clients of justice services	What is the impact of transparency of sharing rules on satisfaction with the outcome as experienced by disputants?	Randomized Controlled Trial, Most Significant Change method, Cross-Sectional Survey
Local context: Data from the organizational context, stakeholders	How can sharing rules that are accepted by courts be developed?	Case Report

Transparency of such an incremental process is key. The evidence (or the lack thereof) needs to be visible. So practitioners and disputants get informed about the extent in which sharing rules reflect practice, are useful for dispute resolution and are perceived of as just. This is how the health care sector deals with the challenge of gradually developing evidence bases. The pieces of information are added to the decision rules, protocols, etc., often after systematic reviews of the smaller studies took place.

Of course, scores can point in different directions. A sharing rule might score high on usefulness but might not be used in practice. Or it might reflect practice whereas the scores on perceived justness are low. This, however, is not an impediment. Just like health care practitioners enable patients to make an informed choice from a limited number of options, disputants can choose from multiple sharing rules. If the validity is made transparent by presenting an overview of evidence, disputants can make their own choice about which sharing rule to follow, or perhaps follow the pattern that is shown. At the same time, disputants are given guidance as to what fair sharing might concretely look like so they can make informed decisions.

6.4 Discussion

Each of the four methods proved to be able to produce sharing rules. They can all be utilized in efforts to systematically develop sharing rules. Each of the methods also has its own weak and strong points when it comes to usefulness of the results produced. Whereas some methods almost certainly yield sharing rules that reflect practice to a large extent (derivation through statistical analyses), others seem less suitable for this (asking for rules of thumb through a survey). The same is true for the extent in which they can objectively be applied and tailored to the specific circumstances of the case.

The variations in scores of criteria for usefulness can be used in a more gradual learning and development process of sharing rules. Triangulation, i.e., combining the different development methods, can help to validate the initial sharing rules developed through one of the methods. The method of asking for rules of thumb as part of a survey might give a broader view on the sharing rules individually used by a group of experts (and thus provide concrete starting points quickly and against relatively low costs). Selections of case law might help to further refine these. Then selecting the most promising sharing rules can lead to further improvement and refinement. Similarly, regression analysis might help to develop a formula that can be translated into a more rule-like format through focus group studies.

Each method is associated with its own amount of costs, some of which are higher than others. These costs might be an explanation of why developing sharing rules does not seem to be an attractive activity and sharing rules are only scarcely developed, even though there are examples of sharing rules in practice and methodologies that work. People who want to develop sharing rules might face several barriers. So if these can be overcome, it might be possible to get processes in which sharing rules systematically get developed.

High costs of data collection
The first challenge is the high cost of data collection. Sufficiently rich datasets are scarce. Data sets typically are not readily available. And even though most countries have a database (online) with case law, this typically only reflects a

small part of dispute resolution practice. Moreover, there is a selection bias in these databases, as a result of the selection criteria for publishing (for instance, exceptionality of the case). Developing representative data sets from these databases thus will be difficult. If mostly exceptions are published, the sharing rule that applies to the most common cases might not be found here.

Getting direct access to case files helps to circumvent this risk. Files with settlements, however, might not be available either, since they are not often centrally stored or made public. Securing cooperation from courts can also be difficult. Privacy concerns play an important role here. Courts need to be careful when it comes to granting access to files that contain detailed and often sensitive information of the parties. In addition, they need to make available staff, space, and other resources to guide the research team. Experience teaches that this might be too big of a burden.

The costs for collecting data through experts are also high. These experts usually have to cope with a big workload, so they might not be inclined to participate in focus groups or fill in long and time-consuming questionnaires. They might also be sceptical towards the idea of sharing rules. Experts proved to be non-cooperative during the focus groups. Some were even frustrating the process by repeatedly and consistently emphasizing that all circumstances need to be taken into account and thus development of a sharing rule is not possible. This is not surprising since reasoning on a case-by-case basis is central in legal education. It also is consistent with the business models of lawyers that are built around the idea that only their specific expertise and experience is capable of giving the correct weight to specific circumstances so that fair outcomes result.

So how can we organize a more systematic process for collecting data? Academies, universities or hospitals can guarantee a constant flow of data where evidence-based medicine can thrive. Unfortunately, there is no such thing as an academic court that could do the same thing. Privacy issues also make this a complicated venue. Secrecy clauses often are part of settlements so little is to be expected here as well. But even though these all are limitations, the positive issue is that—if sufficient funds are available—data sets can be developed. Large enough numbers of cases can be used. Advocates and other professionals can be compensated for the time they invest in these studies, which thus bring about opportunity costs.

Exposure to criticism

Deciding who exactly gets what and has to pay how much is a matter of craftsmanship, taking responsibility, and also simply being brave. Probably this is one of the things that people admire in good judges. But judges who concretely explicate the concrete rule they use to determine the outcome for distributive issues put themselves in a vulnerable position. Any person who develops a concrete definition of a fair outcome can expect criticism. Rules can always be improved. Criticism on concrete sharing rules is always possible. And lawyers are

trained to counter-think. But this criticism also can make it unattractive to develop sharing rules.

This illustrates the importance of a learning process. If development of sharing rules really is seen as a continuous process, it can help to frame criticism as improvements. Then it can become a joint effort to develop as useful and fair rules as possible; just like social scientists team up to either falsify or confirm hypotheses, or researchers working in an evidence-based practice conduct studies that aim to validate existing decision rules and protocols.

No rewards and return on investment

What do people get in return for the big investments that development of sharing rules require? Sharing rules are what economists call information goods. One characteristic is that it is very difficult to protect them. Once the information is out there, it is out there and it becomes very difficult to get money for it (Barendrecht, 2009). Consequently, it is difficult to find good business models for sharing rules, which probably is a barrier to their development. In addition, it is difficult for universities and other research groups to get funding for this type of development. Rulemaking is still seen as something that the legislator and courts should do. Research groups probably do not easily get funding for developing practical sharing rules. The rewards for developing smaller blocks of evidence as parts of a continuous learning process probably are even less. The examples show that such research usually is a side product that is being done as a small part of other research questions. Whereas the developer of a rule—if successful—at least will get some reward in terms of reputation, the researcher who contributes to making the existing rule a slightly bit better probably will not receive even this.

7 Delivering sharing rules: emerging best practices for effective legal information strategies?[9]

7.1 Delivering sharing rules

7.1.1 Legal information that empowers

How can people be informed about sharing rules that help them to settle their disputes? This is the domain of legal information strategies that aim to make people aware of the options of the legal system and the rights they have. Recently, empowering strategies complemented these. These target people exploring their options, self-helpers, self-represented litigants, and the numerous paralegals working in developing countries and aspire to make the law actionable.

Kenieroba is a remote village in Mali, which is a three-hour drive from the closest court in Bamako. People living here tend to rely on customary processes led by their village elder. They know little about laws and the legal system. Most of them are illiterate and only speak Bambara. Which is an impediment when all laws and legal information are in French. A legal aid NGO in Mali called Deme So ("House of Justice") informs people in Kenieroba about basic legal norms for common disputes they have (problems related to agricultural land, inheritance, family problems, etc.). Lawyers are available to provide advice. Deme So observed that the villagers tend to use the legal norms they know and understand next to customary norms when they solve their disputes.

Delivering practical, basic legal information is part of the trend in legal information strategies that emerges all over the world. Many NGOs have some legal information strategy they use. Some are as sophisticated as Deme So developed, whereas many strategies focus on creating general rights awareness. Some developed countries have advanced strategies for legally educating the general public. Creating awareness of rights and support options, building confidence and skills as to improve access to justice are key elements of these strategies.[10] Improving dissemination of legal information is one the major legal empowerment strategies according to the Working Group on Access to Justice and Rule of Law of the Commission on Legal Empowerment of the Poor (Commission on Legal Empowerment of the Poor, 2008). Effective legal information strategies are a crucial element. Knowledge about rights, legal norms and the legal system more in general helps vulnerable people to recognize justiciable problems. So they can seek protection from the justice system. Adequate legal information offers protection in itself. Knowing what your reasonable share is strengthens your bargaining position.

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[9] This chapter is adapted from a paper co-authored by Maurits Barendrecht.

[10] See, for instance, for Canada and England respectively http://www.plecanada.org/ and http://www.lawforlife.org.uk/

Together with the emergence of new ways to deliver legal information, the body of literature on effective legal information increased as well. There, however, is no theoretical framework yet, that guides the legal information strategies of NGOs and other organizations. In this chapter, I try to establish building blocks for a theoretical framework for legal information strategies. First, I review legal need surveys and describe the strategies people use to collect information when they experience a legal problem (section 7.1.1). Where do they go, with whom do they speak, and what are they looking for? These points of access are essential for legal information strategies, because this is where information must be made available so that the clients can pick it up. These are the interfaces of people looking for information when they need it.

Section 7.1.2 looks at legal information from the perspective of people experiencing a legal problem. The literatures about public legal education, dispute resolution and pro se litigants, describe what research found about the kind of legal information that people need. I found eight characteristics of legal information that according to the current body of research knowledge support people who look for solutions for their legal problems.

Developing and disseminating legal information is costly. In section 7.1.3, I explore how to manage the costs for production and distribution of legal information. Legal information is often seen as being case specific, individualized legal advice. I identify possibilities for reaching economies of scale to reduce the costs. I build on the distinction between contextual, case-specific and general know-how.

Section 7.3 presents the data I collected as part of a broader study on legal empowerment strategies of five NGOs (from Azerbaijan, Mali, Egypt, Rwanda, and Bangladesh). I describe the legal information strategies they have and compare them to results found in section 7.1. The NGOs reported challenges and developed new and promising strategies, which are part of this section. Section 7.4 discusses the opportunities and challenges for legal information strategies and the conclusion is presented in section 7.5.

7.2 What do we know about delivering legal information effectively?

7.2.1 Where do people go for information?

In order to understand the processes of providing legal information, a first step is to investigate where people go for legal information. Many studies surveyed the incidence of different types of legal problems and also asked people for their advice and assistance seeking strategies (Coumarelos, Wei, & Zhou, 2006; Currie, 2009; Genn, Pleasence, Balmer, Buck, & O'Grady, 2004; Gramatikov, 2010; Gramatikov & Verdonschot, 2010; Hommerich & Killian, 2008; Michelson, 2008; Pleasence, Genn, Balmer, Buck, & O'Grady, 2003; Velthoven & Haarhuis, 2010). These studies cover a broad array of countries (developing and developed countries) and all identify similar strategies.

The pattern that emerges from these studies shows that most people who experience a legal problem do not go to a legal professional first. Rather, they "shop for justice" and look in their direct environment for information, protection and interventions (Maurits Barendrecht, 2009c). All legal needs studies indicate that people first go to family members, friends and sometimes colleagues for advice and assistance. And they consult a wide variety of other sources as well, before they might consider going to a lawyer or court. Rather, they seek for information on the Internet, in brochures or leaflets, go and talk to their employer, labour union, local politician or public authority, village elder or the police. Maybe they will visit a legal aid clinic or legal aid NGO when the other sources of information and assistance do not yield results. These are the primary sources of information for people.

One study in Canada specifically focused on self-help strategies (A. Currie, 2010). Self-helpers were defined as people that attempted to resolve legal problems by their own, without resorting to professional advice or assistance, be it legal or non-legal. This probably resembles the situation many vulnerable people in developing countries find themselves in. The study found that for many people friends and family are the only source of information they consult (43,1%, Currie 2010), whereas 16,8% looked for information on the Internet. This behaviour was evenly distributed across people from different social economic categories.

These data suggest that whether people qualify a situation as a legal problem and decide to take action probably also depends on the perceptions of the circle of friends and relatives. Social networks are key when it comes to taking action first.

Although these data give a good indication about the different sources of assistance and advice people use, they do not show what kind of assistance and advice people sought. Maybe they wanted to know whether their relatives thought taking action was a wise thing to do, or what they think her legal position was. Or maybe they simply wanted to share their story and problem with them, ask them if they knew who could help them or where they could find more information, or asked for concrete assistance, for instance in negotiating with the other party. Unfortunately, there are no data available yet about the nature of the information and advice sought.

Still, the data indicate that increasing access to justice is not only, or primarily, a matter of strengthening dissemination of legal information by means of legal advisors. Informal mechanisms and sources of information offer opportunities to spread legal information (Commission on Legal Empowerment of the Poor, 2008). A comparative study between the US and the UK confirms this. In the UK, non-legal sources of advice (like national advice providers, local resources like community organizations, elected representatives, and local council advice services) are abundant compared to the US (that has a strong emphasis on lawyers and legal advice). In the UK, people were more likely to take action and

especially lower educated people mostly sought non-legal advice (Sandefur, 2008).

7.2.2 What information needs do people have?

Legal information comes in all forms and shapes. It can be information about rights, legislation, case law, doctrine, etc., but also information that guides people more directly through the landscape of legal problem solving processes. What do we know about the kind of information people need to solve legal problems? The literature about this issue is still rather limited. I found eight characteristics of legal information that are assumed to make it more useful for end users of the justice system.

First of all, the information should be presented in a form that is understandable for the clients without having to consult an expert (Buck, Pleasence, & Balmer, 2008). In other words, it should be straightforward and easy to read and use. This implies that the information should be "translated" in a fashion that enables laypeople to be properly informed by it (Goldschmidt, 2007). Technical concepts need to be redefined in an understandable manner and wording should be carefully chosen. To this end, information can also be conveyed through other information carriers than text, like illustrations, videos, or even video game like formats.

Furthermore, legal information should be actionable and tailored to the problem at hand so that it enables people to actually deal with their legal problem (Collard & Deeming, 2011). Although general information about rights or the legal system helps people to develop a general understanding and recognize legal problems and to assess to own situation and position, it is of limited use to effectively cope with a legal problem (Marfarlane, 2013). Rather, people need information that helps them to assess to position and options, plan the steps to take and shows them what they concretely need to do (Collard & Deeming, 2011; Lawler, Giddings, & Robertson, 2012).

Informing people about rights and possibilities through general public awareness campaigns is probably not enough. Legal information is much more effective if it arrives or at least is accessible just in time, i.e. when it provides a limited number of concrete options to people when they need these to act upon (Lawler, Giddings, & Robertson, 2009). When people actually experience a legal problem, general information obtained in the past, might not be helpful. They might not remember, or not rely and act upon the information previously given. Furthermore, people typically do not go around and look for information about how to solve legal problems until they actually experience one, just like when it comes to health related problems (Flynn, Smith, & Freese, 2006). What they need is information about actions they can take and how to go about at the moment they really need it.

Legal information should be sufficient to cope with the problem and promote self-reliance (Lawler et al., 2009). What issues have to be dealt with, what are steps in the process, where to find more information, where to find assistance, what outcomes can they expect. For instance, informing a woman that wants a divorce about her right to child support in general will help, but she probably wants to know how to determine the amount that is reasonable in her situation. She would also like to be broader informed about the issues she will need to deal with (child support, custody, visiting arrangements, who can stay in the house, etc.), how she can do this and where to find assistance. Information about the different steps in the process of divorce and what to expect from it in terms of money, time and things she needs to do probably also helps her and might slightly reduce the stress she probably experiences (Van Wormer, 2007).

Too much transparency is no transparency at all if there is no guidance through the information. In order to create clarity, information should be limited. Information that is not absolutely necessary should be excluded. Lawyers often tend to think in terms of the exceptions rather than in terms of "standard" cases. However, for effectively delivering legal information to people, it might be better to work with practical rules of thumb rather than with a sophisticated system of rules. Bringing back the information to its bare essentials works better. The options provided to the information seeker thus should be limited (Lawler, Giddings, & Robertson, 2009) and the need for people to make decisions themselves should be reduced.

Legal information should further be practical. Providing general information about rights is important for acknowledgement of the fact there are legal remedies at hand for a given problem, but also information about ways to deal with differences, i.e. negotiation skills, about dispute procedures and what to expect from it (this can be step by step descriptions but also indications of the money and time involved (Gramatikov, Barendrecht, & Verdonschot, 2011), and about the way other people have solved similar problems in a fair manner (sharing rules) should be provided. In order to actually take action, this type of information probably is more useful. It does not only show people what they can actually do to obtain their rights, but also manages their expectations and those of the other people involved.

People need assurance when they face the stress legal problems normally bring forth. Thus, information provided in writing or online can probably best be combined with a help desk, support groups of people in similar situations, or some other form of personal assistance as a back up, so that people can get confirmation that they have understood the information in an appropriate way (Barendrecht, 2011).

Legal information that meets these criteria is not available. Hence, for any effective legal information strategy, this information needs to be developed first. Developing such suitable legal information packages will be rather costly. Although information about legislation, constitutional rights, courts and procedures can be collected at low costs, it will have to be rewritten from the perspective of a user experiencing a legal problem. Collecting and developing information about dispute resolution know-how (skills, sharing rules for distributive issues, court specifics, norms for reasonably living together, etc.) is also likely to be costly. This information typically cannot be found in law books and legal texts but needs the involvement of people with experience in dispute resolution, should be translated into actionable pieces and should be tested in user-panels.

To complicate matters, the direct return on investment may be low, because it is hard for both the producer and the user of the information to assess beforehand the effects of possessing this information. Information is called an experience good: you learn whether it was good after consuming it. Further, protection of investment is difficult because once information is public, everyone can copy it, leaving little incentive to undertake this (Varian, 1999). This probably explains why production of legal information for end-users is not big business, although the needs for legal information are vast. Producing and distributing legal information is hard to turn into a profitable business model.

There also seem to be psychological barriers to producing suitable information regarding rights and processes to access justice. Legal information is often thought of as highly context specific. From their genesis at law school, lawyers are trained to understand that the relevance and adequacy of legal information to a large extent depends on the specific circumstances of a concrete case (Vranken, 2006) and that information about legal norms is country specific and knowledge about the specifics of procedures can even be very local.

What contributes to this view of context-specificity is that legal information is often seen from the perspective of full-service lawyering. The lawyer leads a client through all phases of a dispute prevention and dispute resolution process using many different types of expertise. Lawyers developed skills for an intake, know how to effectively put pressure on the other party, know what facts should be gathered, what substantive legal norms apply, how these norms are interpreted, how a specific procedure works and what arguments usually are effective before a specific judge in a specific court. This often is a bundle of implicit knowledge, often applied intuitively. Breaking this knowledge down into concrete pieces of information that can be re-used by many persons is far from the minds of professional lawyers.

If this bundle of knowledge necessary to handle a case is analyzed in detail, it becomes clear that many pieces of information can indeed be re-used. The general process of dispute resolution may be rather similar (Barendrecht, 2009b). Five elements are recurring. Typically, when a legal problem arises in a relationship with another person or a government body, the other party is contacted. Through communication and negotiation a solution is sought. Sometimes a neutral party facilitates this process (mediation). Legal and other norms and objective criteria are used to find a suitable solution (bargaining in the shadow of the law). Availability of a neutral decision helps to put some pressure on parties to cooperate and can come with a decision if parties themselves do not manage. Ways of contacting the other party and inviting him to cooperate in finding a solution.

National borders do not limit usefulness of negotiation skills, like for instance asking the right question to learn about the actual interests of parties, either. And other dispute resolution skills, for instance, are not completely case or country specific. Negotiation literature and conflict resolution research assume that many techniques and good practices work across contexts, cultures and types of conflict (Lewicki, Saunders, & Barry, 2006; Wall, Stark, & Standifer, 2001), although some differences are acknowledged as well (Gillespie et al., 2000).

There is more information with general relevance for anyone involved in dispute resolution and dispute system design. For instance, psychological studies on procedural justice indicate that people in general tend to value certain criteria when they evaluate quality of procedures (Hollander-Blumoff & Tyler, 2008; Pillutla & Murnighan, 2003). Basic principles of distributive justice are rather universal as well as chapter 4 showed.

In the following table, I distinguish between four different types of information. Producing and distributing each of them may require a different approach, and a different organizational model.

Category	Type of information	Specificity
General (international) knowledge	Skills of negotiating, preparing a case for court, putting pressure on people, good solutions for domestic violence and other frequent legal needs, procedural justice norms	This information can be shared across borders, making huge economies of scale possible, but there are additional costs of translation and possibly of adapting to local tastes.
Country specific knowledge	Rules of substantive law that are really needed to solve the problem, some rules of procedure, generally observed social norms, going rates at courts and in negotiated settlements.	Format for presenting the information can be similar across borders (adaptation to language and local tastes is necessary), but the content differs from country to country.
Local knowledge	Where to apply in this municipality, how does this particular court work? This is the type of implicit knowledge many lawyers offer to their clients.	Economies of scale are much more difficult here, although local social networks may provide them.
Client/case specific knowledge	Facts of the case, interests and characteristics of the parties involved, people who may influence the other party. The client usually provides this information. Or by the lawyer contacting the other party, or by experts collecting evidence. The know-how involved here is mostly asking the right type of questions.	Formats for collecting this knowledge can be fairly general, and may be provided on line. Lawyers who help clients in individual cases ask similar questions throughout the world and use rather similar formats for their documents. So some economies of scale are possible here again.

As the table shows, production costs can be shared. General and country specific knowledge give opportunities for large economies of scale, the same information being relevant for many thousands in a country having similar problems or even millions of people who have family or neighbour conflicts across the globe. For local knowledge it may be possible to share the

information between hundreds of people, but the economies of scale will be less prominent. Client/case specific information can be collected in standardized ways through formats and intake forms, but by definition the information itself has no value for other disputes.

Once information is available, the marginal costs for using it in a new case can be relatively low, depending on the distribution strategy. Providing information on a one lawyer per client basis, however, still is very costly. Making better use of paralegals for less complex tasks is already a good opportunity to reduce costs, but the potential for further cost reduction is huge, if information can be distributed without a professional intermediary to the person who needs it, or with limited support by such an intermediary.

Printed materials are an example of a standardized form that already is common for dissemination of legal information. However, modern information technologies allow for dramatic reduction of costs if combined with standardization. There are several examples in developed countries that show the potential of these forms of distributing legal information (Smith, 2013). In developing countries radio and mobile phones are already deeply penetrated and internet accessibility also is rapidly growing (Bruijn, Nyamnjoh, & Brinkman, 2009), suggesting opportunities for reducing costs of distributing legal information, also in these contexts.

7.4 Summary: effective legal information strategies

I reviewed the literature on legal information and described what we know thus far about effective legal information strategies. I looked at the distribution channels that seem most appropriate to deliver the information, because people generally tend to look there and found that the direct network of friends and relatives is a very popular source of advice and assistance. Also, non-legal advisers are popular, especially among lower educated people.

Next, I examined the – often-implicit – need for legal information people have and found several characteristics that makes it more useful. I found that legal information probably is most useful when it:

- is presented in a form that is understandable for the clients without having to consult an expert;
- is tailored to the problem at hand;
- arrives just in time (when needed to act upon);
- is sufficient to cope with this problem, promoting self-reliance;
- offers a limited number of options;
- includes general information about rights, but also about practical ways to deal with differences (negotiation skills), about dispute procedures, and about the way other people have solved similar problems in a fair manner (sharing rules);

- is provided in writing or online is combined with a help desk, support groups of people in similar situations, or some other form of personal assistance as a back up, so that people can get confirmation that they have understood the information in an appropriate way.

Further, I discussed the costs associated with developing legal information and found that for some types of information standardisation seems possible and thus economies of scale can be reached. Developing and disseminating legal information is costly which makes it unattractive for stakeholders to undertake. However, given the different types of legal information innovations seem possible with regards to reducing these costs and sharing know-how and experiences.

In summary, this is the knowledge about effective legal information strategies the literature contains. In the next section, I have a closer look to the practice of disseminating legal information.

7.5 Legal information strategies of five legal aid NGOs

7.5.1 Context and method

In this section, I present the data on legal information strategies collected in five developing and transitional countries. The data were collected as part of a study on the legal empowerment strategies and working methods of five NGOs in five different countries. This is a convenience sample as the research partner, Oxfam Novib, selected the countries and local organisations. The criteria for inclusion were that they were (partly) funded by Oxfam Novib, provided legal aid services to individuals, and worked in countries with significant rule of law problems. Using these criteria, the following organisations were selected: Ain O Salish Kendra (Bangladesh), CEWLA (Egypt), Haguruka (Rwanda), Praxis (Azerbaijan) and Deme So & Wildaf (Mali).

Organization	Organizational Goal
Praxis Support to Social Development, Azerbaijan	The overall aim of the organization is to promote conditions of sustainable human development in which people are able to enjoy a full range of human rights, fulfil their needs free from poverty and live in dignity.
Deme So/Widaf, Mali	Support democracy, promote human rights in Mali/Promote the rights of women in Mali
Haguruka, Rwanda	Promote and defend the rights of women and children.

Cewla, Egypt	Address the violation of the rights of women by creating legal awareness, support in obtaining their legal, social, economic and cultural rights, and promote change discriminatory laws, especially against women.
ASK, Bangladesh	Promote and protect human rights.

Table 1: Selected organizations and organizational goals

The study followed the methodology of action research. Its aims was to let a 'community of practice' — "a group whose members regularly engage in sharing and learning, based on their common interests" (Lesser & Storck, 2001) — reflect on current practices, address issues, gather data and solve problems (Whyte, 1991). The process of action research is characterised by interactivity. During the process, members of a community of practice share information and experiences in order to learn from each other.

The research took place over a period of 6 months between 22nd November 2009 and 12th May 2010. A separate research trip of ten days was made to each organisation during this period. Each field trip was carried out by at least two researchers. Quantitative data were collected by the organisation using a legal needs survey method. The questionnaire contained questions on the prevalence of legal problems, strategies for coping with these problems, and legal empowerment. Qualitative data were collected through observations of day-to-day practice, interviews with facilitators (lawyers and paralegals), other local legal aid NGOs, stakeholders (judges, lawyers, police, local leaders, paralegals) and focus groups with beneficiaries and non-beneficiaries.

The data below were collected during the action research study. They were obtained during and in between the different sessions, interviews and focus groups, asking for legal information strategies in general. There was no systematic data-collection, following a predetermined protocol asking more specific questions. The data thus do not give a complete overview of what the organizations do. Still, they give a good impression of practices that can be found among legal aid NGOs.

7.5.2 Legal information strategies found

I found a broad variety of legal information practices among the five organizations included in our study. It seems that dissemination of legal information is an important part of the strategies for attaining the broader goals they set themselves. The information delivered varies from more abstract (what rights do people have) to concrete (where to obtain which document) information. I did not find any sharing rules that the NGOs disseminated. In most cases, general and country specific information is provided to the public.

This information is disseminated by means of personal consultations, printed materials and media productions.

In the following table, the practices are described in the terms discussed in Section 7.2, i.e. a short description of the kind of information, the method for delivering the information, an indicative evaluation of needs met, the type of information and estimated effectiveness of costs per person informed. Obviously, scores on the extent to which the information meet the known needs of people and the costs per person informed are not vigorous scores.

Country	What information	Delivery method	Needs based	Type of infor-mation	Costs per person informed
Azerbaijan	General rights, such as constitutional rights, or rights of internally displaced persons	Leaflets, internet	Medium	Country-specific	Medium (leaflets), low (internet)
	Legislation	Internet	Low	Country-specific	Low
	More concrete information about certain benefits and procedures to obtain them	Leaflets, workshops beneficiaries	Medium	Country-specific, client/case-specific	Medium
	Decisions from government officials and from courts	Printed documents	High	Country-specific	Medium
	Examples of successful cases and how they were dealt with	Printed documents	High	Country specific	Medium
	Code of conduct for government officials	Internet, leaflets, meetings with public	High	Local	Low (internet), medium (leaflets),

		officials			high (meetings with public officials)
	Information about rights, procedures, information to gather	Individual consultation, telephone, internet Q&A	High	Client/case specific	Very high (office visits), high (telephone), medium (internet Q&A)
Mali	Communi-cation and negotiation skills for living together	Mediation sessions	High	General	Very high (mediation sessions)
	Communi-cation and negotiation skills for facilitating dispute resolution	Handbook, training paralegals	High	General	Medium (handbook), high (training)
	Basic principles for living together	Training paralegals	High	General	High
	General information about human rights	Workshops, printed materials	Medium	General	High (workshops), medium (printed materials)
	Skills for training paralegals	Training paralegals	(Aimed at paralegals)	General	Low (viral disseminatio n)
	Information about how to obtain documents and registration	Training paralegals	High	Country specific	High
	General information about the legal system	Radio broadcasts, community meetings, training	Low	Country specific	Medium/low (radio broadcasts), high

		paralegals			
	Information about rights, procedures, information to gather	Individual consultation	High	Country specific	Very high
Egypt	Communi-cation and negotiation skills for living together	Self-support groups, training for local cadres	High	General	Medium (self-support groups), high (training local cadres)
	Basic principles for living together	Self-support groups	High	General	Medium
	General information about rights	Workshops with members of target group, trainings for cadres, documentaries, theatre performances	Medium	Country specific	High (workshops, trainings), very high (documentaries, theatre)
	Information about reasonable amount of child support	Individual consultation	High	Country specific	High
	Information about rights, procedures, information to gather	Individual consultation	High	Country specific	Very high
Rwanda	Communi-cation and negotiation skills for facilitating dispute resolution	Handbook, training paralegals	High	General	Medium (handbook), high (training)
	Basic principles for living together	Training paralegals	High	General	High

	Legislation	Printed materials	Low	Country specific	Medium
	Case law	Keep records	Medium	Country specific	Medium
	Information about rights, procedures, information to gather	Individual consultation	High	Country specific	Very high
Bangladesh	Communi-cation and negotiation skills for facilitating dispute resolution	Handbook, training paralegals	High	General	Medium (handbook), high (training)
	Dispute resolution experiences	Peer groups paralegals	High	General	High
	Skills for training paralegals	Training paralegals	(Aimed at paralegals)	General	Low (viral disseminatio n)
	General information about human rights	Workshops with members of target group, trainings for paralegals, documentarie s, theatre performance s	Medium	Country specific	High (workshops, trainings), very high (documentari es, theatre)
	Information about rights, procedures, information to gather	Individual consultation	High	Country specific	Very high

What are the patterns? There is a certain emphasis on general information about human rights. Information about the precise rules in laws is less common and this is also true for disseminating decisions of courts. Basic principles for living together, as well as communication/negotiation skills are spread primarily through workshops. Dispute resolution methods are communicated to paralegals in handbooks and trainings. As yet, there is little information aimed at self-helpers who want to access procedures on their own. Specific information on what types of outcomes people can expect (sharing rules, going rates of justice) is scarce. If it is available, this is given in the form of personal advice.

An interesting form of information is the code of conduct for government agents that was distributed in Azerbaijan. This sets a standard for expectations of good behaviour, to which clients or providers of legal assistance can refer.

Most of the information is disseminated through printed materials, group sessions and individual consultations, which are all rather costly methods. In two countries, we found that sophisticated media productions requiring major investments (theatre, documentaries) were used to inform the public about rights. Radio is a frequently used medium. The Internet was used only in Azerbaijan. Training skills were used as a medium in Mali: paralegals learn legal information plus the skills of transmitting this information to others.

7.5.3 Challenges reported

During the study, the facilitators and members of the organizations' management mentioned several challenges relating to their legal information strategies. Many of these challenges were related to the needs for information of their beneficiaries. Much reflection seemed to take place on whether they provide the information that is really supporting them, what information people need to be guided through the process and how to systematically assess this. In addition, one challenge mentioned, was about discovering what backing people need in order to be empowered.

On the other hand, sharing and processing information can be risky for NGOs. One NGO has experience with pressure from government and embassies when it was considering to publishing and sharing the information from its archives. Over 16 years of case files have been collected, but due to this risk, the NGO is reluctant to publicize the information itself.

The NGOs face cost related challenges as well, so they said. They reported that for their budgets, development and dissemination of printed materials was a heavy burden and that they were eager to find cost efficient ways of doing this. In addition, keeping materials up to date, not only for clients but also for their facilitators, was seen as a problem. They already developed come first ideas about sharing knowledge and costs. NGOs were rather eager to cooperate with other organizations, but were yet uncertain about a good structure and guidance as to how to do this concretely and how to reasonably share costs.

As the literature on information goods predicts, free riding behaviour was one of their concerns. If courts only sparsely write down decisions and individual lawyers sometimes will do this themselves to create a database of case law, it makes sense to share this. But at the same time, some lawyers might put in much effort, whereas others would only freely benefit. What would work here?

With regards to the issue of where to deliver the information in order to be effective and when to deliver it, they reported no challenges.

7.5.4 Discussion of results

Supplying legal information – in the broad sense of the information that is necessary to obtain access to justice in the real world – is part of the activities of all organizations included in this study. There is much variation in and uncertainty about how to do this, however. Some legal education efforts are not going beyond distributing copies of formal laws. At the other extreme are sophisticated media productions with stories and real life cases as the basis. In between are training programs that use sophisticated popular education techniques.

Many activities aim to increase awareness of substantive (human) rights. Procedural norms and processes of accessing rights seem less prominent. With respect to information that is relevant for dispute resolution, objective criteria (going rates of justice for inheritance, child support, etc.) are not systematically collected and published. Little efforts in disseminating information that stimulates self-help exist, for instance by describing step-by-step processes for solving common disputes. In Rwanda, Bangladesh and Mali, the NGOs produced handbooks for paralegals, however.

When compared with the state of the art from the literature, it is interesting to note that there is an emphasis on teaching about rights reflecting basic principles for living together (no violence in family, no damage to environment, no arbitrary use of government powers). There is also a perceived demand for communication and negotiation skills for living together (harmonious family life, community relationships), which are often spread in workshops with groups of beneficiaries (Egypt, Mali, Bangladesh).

Organisations struggle with distribution of legal information in the sense that they do not succeed in reaching a broader public. In Mali, Deme So explored interesting models for virally disseminating information. Facilitators do not only learn how to help people cope with their disputes, but also receive training in training skills. They can use these skills to teach their clients how to facilitate the resolution of future disputes.

There is as yet little use of modern information technology. This is understandable, because many people of the target groups do not yet have regular access to Internet. At the same time, this situation is rapidly changing. Moreover, modern information technologies offer a way to distribute the information in a way that it arrives when needed (just in time) and against lower costs.

It seems possible to refine and improve the legal information and legal education strategies. However, it is costly to produce legal information materials. There are opportunities, but it is necessary to find models for sharing these costs. In Rwanda, a first step in this direction has been undertaken by setting up a legal

aid forum that can coordinate such efforts, linking the numerous NGOs having a stake in legal aid.

7.6 Conclusion

7.6.1 General

There is a lack of solid theory regarding legal information strategies that can inform the dissemination of sharing rules. Although legal information is often discussed as a powerful instrument for providing access to fair outcomes (in the context of legal empowerment and self-help), a vigorous theoretical framework for evaluating legal information strategies does not exist yet. The emerging body of literature, however, provides some building blocks for such a framework. The focal points in the literature are the sources of legal information that people use, the need for legal information that people develop once they experience a legal problem and the costs associated with producing and disseminating appropriate legal information.

At the same time, the dissemination of legal information is an important part of the activities of legal aid NGOs in developing countries. They see legal information as a powerful instrument to realise rights. These NGOs aim much of their efforts at informing their target groups and the broader population. About what their rights are, where they can go, what they can do, what they can realistically expect. A lot of different practices have been developed, yet the effectiveness of these is unknown. This study indicates that several opportunities for improvement exist.

7.6.2 Opportunities and challenges

Reaching out to people with legal information is difficult. It has to be done timely, i.e. when they actually experience a legal problem, and the information has to be understandable, tailored and actionable.

Dissemination of legal information
I found that people in both developed as developing countries usually look for information in their direct network of friends and relatives. This suggests an opportunity to reach people by disseminating information into these networks. Legal information strategies can target these networks rather than targeting every individual. There are several practices where key persons in a community, like schoolteachers, doctors, and village leaders are trained to inform about basic legal issues. I even found one example in Mali where paralegals were trained to transfer information about how to resolve disputes to their clients. Another opportunity may be to make more and better use of modern information technologies like (mobile) Internet and others. Of course, many people may not have regular access to Internet. But given the prominent way of searching information through family networks, the issue may be whether at least one family member has this access. There are some examples of legal information

that is virally disseminated throughout networks and communities. This opens possibilities for effectively informing people. Methods for doing this more systematically should be further explored and developed.

Managing costs and economies of scale
Instead of being bound to countries, or even specific cases and clients, several sorts of legal information seem to have some universal, across the border, validity. Especially, information about skills for resolving disputes, basic norms for living together and sharing rules for reasonable solutions can be useful across borders. This opens up the opportunity for reaching economies of scale in producing this information.

There is some theory about the different tasks that typically need to be performed in the process of dispute resolution and the related skills and information needed for this (Barendrecht, 2009a). The first steps for systematically reviewing actual work processes also have been taken (Monster, Porter, & Barendrecht, 2011). Obviously, this is a two way learning processes, since the practices developed by NGOs provide substance to the theory. If NGOs share good practices among each other, and a state of the art develops, it becomes possible to produce legal information that describes, scrutinises and thus supports these practices. This can result in sharing rules, self-help tools, and information that empowers people in their relationships to conflict partners. And in their relationship to lawyers, judges and other dispute professionals that support them in coping with their legal problems. Development of evidence based practices and of suitable legal information probably goes hand in hand. The NGOs noted that this requires good coordination and that there may be some tricky free-rider problems that have to be solved first.

7.6.3 Building theory

Thus far, there is no generally accepted theoretical framework that provides guidance to the legal information strategies of organisations. As a result, practice shows large variation, with many different types of methods and activities being used. Data about the impact of these methods and activities do not exist. Current practice is non-systematic, with a lot of different legal information strategies and no clear idea about the effectiveness of these. More research needs to be done regarding ways to effectively reach people with information at the right time, what information people really need to solve their legal problems, and other criteria that can be used to evaluate strategies.

8 The practice of developing sharing rules: observations and reflections

8.1 Four legal aid organisations developing sharing rules

During the course of this study, I advised four legal aid organisations when they developed sharing rules (Legal Aid Board in The Netherlands; Kituo Cha Sheria in Kenya; Lawyers for Justice and Peace in Egypt; and the Institute for Research and Development Africa in Uganda). These organizations invited me to act as academic consultant during their efforts to develop sharing rules.

The organisations applied one or more of the methods I described in Chapter 7. I shared research knowledge about development methods as to inform the design and implementation of their initiatives. In addition, I helped to analyse the results that these methods yielded and supported them to develop sharing rules from these research results. This provided me the possibility to observe what a process of development of sharing rules looks like in practice and to have test cases for the methods described in Chapter 7.

In the following sections, I describe the organisations and the nature of the sharing rules development efforts that each of these organisations undertook. In addition, I share the observations we did during their efforts as well as some reflections, focusing on the challenges in the process and the ways to overcome them.

8.2 Netherlands: sharing rules and objective criteria for divorce and consumer issues

The Dutch Legal Aid Board was constituted by the Dutch Minister of Justice. According to their website (http://www.rvr.org/nl/about_rvr), its aim is to make sure people in The Netherlands will have legal representation should they require any. If they cannot afford a solicitor, the Council provides financial support. Their solicitor will receive a monetary allowance. People will pay part of the cost themselves. The size of this contribution depends on the height of income.

The Legal Aid Board sees an opportunity in empowering people to cope with their legal problems through web-based tools. As an expression of this, it developed a special website that aims to empower people who are breaking up their relationship (both married and unmarried, see www.echtscheidingsplan.nl). On this website, people find information about what they can expect when they enter into a divorce process, and where they can find support if they need assistance. Divorcing people can also jointly draft a divorce agreement with the support of a web-based tool this website offers. The tool integrates state of the art in problem-solving dispute resolution, and communication and negotiation tools. In addition to this, the Legal Aid board develops a similar web-based tool for consumers as part of their project Signpost to Justice. This web-based tool

will consist of a diagnosis tool so people get an indication of what support and advice is suitable in their situation. Consumers can find a toolbox with standard letters that they can send to the seller, basic information about their rights as a consumer, and information about the different types of advisers that can help them.

The Legal Aid Board asked us to advise on the development of sharing rules and other objective criteria to integrate in the two web-based tools. They were looking for ways to simplify the calculation of reasonable amounts of child support and alimony for the ex-partner so people can get a quick indication. The Legal Aid Board also wanted to provide examples of good arrangements for caretaking tasks and visiting arrangements in the cases where children are involved. Such good examples are what they call objective criteria. Further, they wish to add sharing rules and other objective criteria to the toolbox for consumers (for disputes related to cars and other transport vehicles, electronic household devices, furniture and travelling).

The Legal Aid Board implemented four different methods for developing sharing rules and objective criteria. They 1) organized expert focus groups for developing sharing rules for divorce issues and (2) collected data from the files of a family court for analysis. For the sharing rules and objective criteria for consumer issues, they 3) developed a questionnaire with first drafts of sharing rules that they disseminated among 1000 lawyers from their network to respond to collect feedback and alternative versions of these sharing rules. They 4) also reviewed the published decisions of the Dutch Consumer Dispute Commission, an adjudication body that deals with disputes between buyers and sellers. The goal was to explore whether the decisions show patterns.

8.2.1 Practitioner focus groups for developing sharing rules for divorce issues

The Legal Aid Board organised three focus group meetings with practitioners. The goal of these was to develop first drafts of sharing rules and objective criteria for divorce issues. Each of the meetings had between six to 10 participants and took about two hours. In one group, one judge from a family court participated, as well as a civil notary. The rest of the participants were family lawyers and mediators. Participants received a modest compensation for their participation that covered their travel expenses.

The meetings started with an introduction to the plans to develop web-based tools that aim to support people in a divorce. In each meeting, the web-based tool received some criticism. Some participants stated that they did not believe in the possibility of a generally applicable tool for parties, and that tailor-made advice is a bare necessity for dealing with divorce issues. In each group, however, some participants also found that it can be useful and expressed curiosity in learning about the final product.

After the introduction and a round of general feedback, there was an introduction to the goal of the meeting, which was the concept of sharing rules and objective criteria (phrased as developing sharing rules). In each of the three focus groups, the concept of sharing rules yielded much criticism. Participants rejected the idea of generally applicable rules that help to determine a fair share. They stated that this goes against the notion of doing justice by looking at all the specifics of a case. Sharing rules, thus, abstract too much, according to the participants. The rejection of sharing rules seemed to be omnipresent. So most of the time was spent on discussing the possibility and desirability of sharing rules.

During the second and the third focus groups, the facilitator tried to develop sharing rules by asking the practitioners to design a hypothetical scenario of two divorcing people with children. This was so the practitioners could indicate the amounts of alimony and child support they found reasonable on the basis of their experiences. The idea behind this was to see whether a set of slightly different scenarios showed a pattern in the outcomes. These attempts, however, did not yield the desired results. The practitioners remained sceptical and did not want to fully engage in this exercise. Hence, it turned out to be challenging to collect their ideas based on experience. And in the end, the focus groups did not result in first drafts of sharing rules.

One possible explanation for this is that the participants felt that sharing rules go against their professional standards. The golden standard for many lawyers is that what a just outcome is, depends on all circumstances of a case. Lawyers tend to look into all circumstances of an individual case, apply abstract legal norms, and rely on their expert know-how to define a fair outcome. Formulas, schedules and other concrete guidelines prioritise among the circumstances of an individual case and allocate a specific weight to define fair outcomes. Although they use many guidelines and criteria in their daily practice, the concept of sharing rules is unfamiliar to most lawyers and they are not used to participating in developing such guidelines and formulas. Being asked to do this might even feel like a threat to their standards, professionalism and even their business model. Several lawyers came up with examples to show why they felt that sharing rules are a bad idea. These concerned negotiated agreements between divorcing people that they saw. The examples were of parties who agreed on an amount of paying child support that was either higher or lower than the amount according to what their lawyers thought would be obtained in a court. The lawyers complained that they had to convince their clients to not settle for this. It shows how difficult it can be for practitioners to take a perspective that they are not familiar with.

Reflecting on one's own decision-making behaviour might be less difficult for adjudicators than for lawyers and mediators. The latter are not professionals that are used to making decisions. Lawyers specialize in arguing why their position is the correct one and mediators typically have a more facilitating role in dispute resolution. Judges and other adjudicators, on the other hand, decide cases as

their core business. And they constantly have to justify their decisions. So they already are used to reflecting on the decision they take. So they may be more inclined to participate in developing sharing rules. Actually, judges developed many of the sharing rules that are available. Still, not every judge seems to be willing or capable to undertake such effort.

A more subtle approach and introduction to sharing rules might help as well. During the focus groups, the facilitator was to the point and direct. After the introduction of the project as a whole, he shared the goal of the focus groups and the perspective on sharing rules rather explicitly. Participants immediately announced their objections and scepticism. This might have set the stage and prevented them from developing a more constructive attitude. Instead of defining the goal of the meeting as being the development of sharing rules, maybe it is better to take a more indirect approach. It might be key to frame it differently, for instance by sharing that the goal is to learn about their expertise in determining outcomes. Instead of proceeding with a very difficult question (for example, what can a sharing rule for child support could look like?), it might be more effective to start with easier questions. For instance, by presenting the participants with a number of straightforward cases and asking them what they think a fair outcome could be, or what further information they would need to determine one. By showing them what you are after instead of telling them, it is possible to gradually introduce the concept of sharing rules to the participants.

8.2.2 Collecting and analysing data from family court files to develop sharing rules

Following up on the practitioner focus groups, the Legal Aid Board analysed data obtained from divorce cases from a Dutch family court. This court granted permission to access 500 paper files and facilitated them in this. The Legal Aid Board wanted to collect a variety of data, including the dates of birth of the divorcing people and the children, past and current incomes, division of caretaking tasks and visiting arrangement, costs for the children, amount of child support that the court established, etc. Their objective was to explore whether it is possible to define a formula that can accurately predict the reasonable amount of child support this family court would establish.

The Legal Aid Board had a team of four people that collected data. It turned out that it was challenging to find the data they looked for in the files. After three weeks, they had data from 200 court files that dealt with determination of child support. Due to limitations in resources and agreements with the court, they had to stop collecting data after this period. None of the files that they examined contained all the data that they were looking for. And only 51 files had information about the number of children involved, the current gross annual income of both of the disputants and the gross annual income during marriage of both of the partners. Still, they managed to derive a formula that can be used to determine child support, or at least the first step in a process of developing a sharing rule that is more robust.

Finding a court that wanted to cooperate in this study was challenging. Five courts were invited. Four courts stated they were not interested in this, since they did not see the added value it would have for them. One court agreed after a process that took about two months. A possible reason for this might be that studies like these pose a burden on courts. They have to make people available who can collect the files and monitor the research. In addition, they need to free up a place in the courthouse where the files can be stored and browsed through by the research team. In the preparation of the project with the court that agreed to cooperate, privacy was a major issue. The case files contain personal information about divorcing people and their children. So the court staff was concerned about this information remaining secret and privacy was respected. The members of the research team had to sign a statement in which they promised to do such. Such privacy concerns might be an extra barrier to cooperating since the courts are responsible for this. All of this comes at a cost since it requires courts to make available resources to safeguard the privacy information. So, in a way, it is understandable that courts hesitate to open up to projects like these. Especially if they do not see direct added value for their work. Courts might be more open to cooperation if there would be a way to compensate them for the costs they make.

Another challenge that the Legal Aid Board encountered was the lack of data in the files. Many files did not include data that might be crucial to determine a reasonable amount. Some files did not have stated incomes (either through documentation or simply a stated number). This might be a result of the adversarial nature of Dutch civil procedure. Parties only have to provide evidence for the amounts of their yearly salary, for the costs made for the children, etc., if the other party contests their claims and statements. Judges depend on them to come with these data and may talk about these data in the hearing, without making notes of this that end up in the files that were given to the research team. If parties do not provide data that support claims, they will not end up in the files. So the data that can be collected (at courts and otherwise) has limitations. This might be overcome by having more resources available. If it is possible to go through more files and collect more data, a sufficiently rich and large dataset can be developed. And, consequently, more robust sharing rules can probably be developed as well.

8.2.3 Surveying practitioners to develop sharing rules for consumer issues

For the development of sharing rules for consumer issues, the Legal Aid Board designed a survey study. This study focused on common issues related to cars and other vehicles, home appliances, and travelling. Respondents could indicate to what extent they found sharing rules on a questionnaire are fair and reasonable according to their experience (on a five point Likert scale ranging from very unreasonable to very reasonable). For the development of the questionnaire, they used sharing rules that are used in other countries. South Korea has an especially sophisticated list of sharing rules for consumer issues

that is developed by the Korea Consumer Agency. But they also used case law of the Dutch Consumer Dispute Commission, legislation, and guidelines that trade organizations developed. The questionnaire consisted of about 20 items in total. The questionnaire encouraged respondents to propose modifications and to indicate fairness.

In total, 1000 lawyers received the questionnaire as a link in an email with an introduction. The link directed them to an online version so they could fill it in from their computer. Only 31 lawyers responded. And even though they were explicitly encouraged to do so, none of the respondents came with concrete suggestions for modifications. Some used the open text fields for sharing these to ventilate criticism towards the Legal Aid Board, which had to do with the fact that the organization was promoting self-help too much. Other comments stated that despite the sharing rules, many would be depending on the circumstances of the case. All respondents did, however, indicate the fairness of the rules.

What explains the low response rate of 3.1%? One reason may be that for lawyers with a busy practice it might ask too much of their time. Another possible explanation is that, just as was the case with the focus groups for divorce issues, the lawyers felt resistance against the concept of sharing rules. The fact that several respondents indicated that despite the sharing rules, all circumstances of the case should be considered, points in that direction.
The criticism that was geared towards the Legal Aid Board itself might also indicate that there was a broader sense of this among the lawyers whom received the invitation to participate. The Legal Aid Board is one of the organizations in the frontline of innovation of legal aid in The Netherlands. It actively seeks to develop tools that promote self-help. Some responses criticized the fact that it now does this for consumer disputes. The general tendency was that the Legal Aid Board increasingly is doing such and getting a budget for this, which is not in the interest of legal aid lawyers. Perhaps these lawyers found that self-help tools have little added value compared to the value of individualized legal advice from a lawyer. So they might perceive a conflict of interest: investing more in tools that enable people to do more themselves means investing less in subsidized legal aid. This type of resistance and criticism probably is part of any innovation process, but still poses a barrier. If this is the reason for many lawyers not to participate, using a larger group of practitioners might be the most feasible way for involving them in the development of sharing rules. Again, identifying the individuals that are open for this is more fruitful. Focusing on them and trying to get them committed probably is key.

Still, 31 lawyers took the effort to indicate the extent in which they found the sharing rules reasonable. An explanation for why they did not come up with suggestions for modifications could be the very positive scores on fairness of the sharing rules proposed in the questionnaire. Only one sharing rule had a majority (29 respondents) that indicated that it was unreasonable or very unreasonable. The majority of respondents indicated they found the rest of the sharing rules to be reasonable or very reasonable. So they might not have seen a reason to

modify it. If this is true, a very cautious conclusion might be that indeed it is easier for practitioners to provide their input as a reaction to a first draft of a sharing rule. And, more importantly, that developing sharing rules on the basis of those that are used in other places can yield results that practitioners find fair on the basis of their experience.

8.3 Kenya: sharing rules for the most urgent distributive issues

Kituo Cha Sheria Center for Legal Empowerment is the oldest Kenyan non-governmental organization that provides legal aid to the poor and marginalized in Kenya. It was established in 1973. Their mission statement according to their website (www.kituochasheria.or.ke) is to empower the poor and marginalized people to effectively access justice and realize their human and people's rights through advocacy, networking, lobbying, legal aid, legal education, representation and research.

The focus of the legal aid activities of Kituo is on legal problems in the area of land (tenure protection, land grabbing), housing (landlord-tenant issues), employment (fair wages and labour circumstances, dismissal), neighbour issues (nuisance, border disputes) and to some extent family problems (inheritance, divorce, maintenance). Kituo runs two large programs. First is the delivery of pro bono legal aid. They have a network of about 500 volunteer advocates from across the country that supports them with this. Second is the delivery of assistance to the poor living in slums. They have five community paralegal justice centres that are staffed by local people who received basic paralegal training.

Kituo asked my advice for developing sharing rules that their paralegals can apply. They have a project, which they call mSheria (Swahili for mobile justice). As part of this, Kituo develops an sms-helpdesk for their paralegals and also other people to use. The basic idea behind this project is that paralegals can ask for legal advice per sms that is then sent to a website anonymously. The volunteer advocates that Kituo works with will answer these questions on the website after which these answers are sent back to the mobile from which the question was initially sent. As part of this gateway, there will be a menu that can be browsed from a mobile phone, which guides people to the sharing rules that are appropriate for their situation.

Kituo wanted to start with sharing rules for the most common, urgent issues that paralegals in Nairobi help people with. According to the paralegals who work in Kibera and Kamukunji (the two slums in Nairobi where Kituo has community justice centres), these issues include termination of employment, fair wages, increase of rent, end of lease by landlord, and maintenance money for children. Kituo used two methods for developing sharing rules, namely practitioner focus groups and a survey study.

8.3.1 Practitioner focus groups

Kituo organized two focus group meetings at their premises in Nairobi. Each focus group had six participants. Participants were lawyers and advocates who were selected by Kituo from their network. Selection took place by identifying and engaging lawyers who were thought to be most willing to actively engage in the session. The sessions both started with an introduction to the mSheria project (as not all staff members that participated were fully up to date on it) and its goal to deliver actionable information to their paralegals. The responses to this were positive and all participants seemed to subscribe to the basic idea underlying it: have more effective channels to efficiently provide legal advice.

After this general introduction, the facilitator informed the participants about the goal of the meeting. This was defined as learning from them what information could help their paralegals to determine fair outcomes for the common issues these paralegals specified. To come to this information, the facilitator first invited the participants to determine the order in which these issues would be dealt with. After this, they discussed these issues one by one. First, participants could share their general ideas about what information they thought would be useful. After they shared their ideas, the facilitator invited them to sketch a set of common scenarios for each issue. They used these scenarios to define outcomes per scenario and to derive a sharing rule from the pattern that these outcomes showed.

This exercise indeed resulted in a first version of sharing rules for most of the issues. The strategy of not directly asking them for sharing rules but rather gradually working towards identification of patterns seemed to work well. By letting them give answers about reasonable amounts of maintenance money, compensation in case of unfair dismissal, reasonable rates for the rent, etc., they gradually came to see themselves that there indeed was some kind of pattern that emerged.

In addition, participants all seemed to find sharing rules as a useful tool. They acknowledged there is a clear need for more concrete, actionable legal information to deliver to their paralegals and to monitor the decisions of courts. Interestingly, they showed hardly any of the resistance against sharing rules that lawyers sometimes have, as the experiences in The Netherlands that are described above show. Maybe this is due to the fact that the problem of access to justice in Kenya is bigger than it is in a country like The Netherlands. When people work in a weak legal system, with no stable legal aid fund and very few available lawyers, the legal information void probably is experienced as being much stronger. So following the golden standard that justice is a matter of applying abstract norms to all circumstances of each individual case is not going to help to deliver justice on a larger scale. In these circumstances, lawyers might be more susceptible to the concept of generally applicable rules that practically and concretely indicate concrete outcomes. If one experiences a great need for

this type of actionable information in their daily practice and there is too little tailor made justice available, new ways might be more attractive.

During the meetings, the participants actively engaged in the discussions. This might have to do with the prior observation, and the fact that participants were all active in legal aid probably also matters. The fact that the participants more directly benefited from the focus group results might have given them a sense of ownership. Even though the participants received no compensation for their contribution and presence, this might have incentivised them to put in real effort.

8.3.2 Survey study among judges and lawyers

Kituo also developed a questionnaire with 43 questions asking them how to determine the outcome of a specific distributive issue (for example: how can a reasonable amount of child support practically be determined?). The questions covered common issues related to family, land, housing, employment, business, and consumer problems. Each question was accompanied by an example of a sharing rule to give the respondents a more clear idea of what an answer could look like. Kituo disseminated this questionnaire among a group of 50 lawyers and judges that attended the courses on public interest litigation that they provided.

The response rate was 50%. Ten questionnaires were incomplete, leaving 15 completed questionnaires. According to the administrators of the survey, some people spent almost two hours working through the questions. Several answers did not have the concreteness of the sharing rules examples that were part of the questionnaire. Some answers to abstract concepts (needs, reasonableness, etc.) or stated that it depends on the circumstances. There also were sharing rules among the data that was collected.

During the filling in of the questionnaire, respondents started complaining about the amount of work that was asked from them. This might have impacted the quality and the quantity of the results. So 41 items is probably too much for one questionnaire. In addition to this issue, it is not likely that one respondent has much experience on all of the issues that were covered by the questionnaire. So it might be difficult to reflect on them. A way out of these issues of size and broad coverage might be to still work with an exhaustive questionnaire but to ask respondents to first carefully read it, and to fill in a minimum number of questions, for instance, ten. In this way, the time investment they will have to make is much less, increasing the chance that they contribute their best effort. And at the same time, respondents can choose the items that are closest to their expertise and experience.

8.4 Egypt: sharing rules that are used by Qadis and Muhakim

Lawyers for Justice and Peace (www.cewla.org) is the name of an Egyptian NGO that was established in 1995. Its mission is to address violations of women's rights through the development of legal awareness, and support them in getting their legal rights and social, economic and cultural rights. Women are the most important target group. They provide legal aid. For this purpose they hold office in Bolak Al Dakror, the largest slum in Cairo. They also closely cooperate with legal aid organizations throughout Egypt.

One of the projects of Lawyers for Justice and Peace focuses on traditional adjudicators. Traditionally, qadis (informal adjudicators) from the Sinai desert, muhakim (arbitrators) and other kébir (wise old people) play a role in settling many of the disputes between people in Egypt. In most of the disputes, they act as an adjudicator dealing with land problems, water conflicts, business problems, family problems or honour-related disputes (insult of families) Lawyers for Justice and Peace sought to facilitate exchange of knowledge and skills between these traditional kébir. Most of them work isolated in their own communities and they expressed the desire to learn more from their peers that are active in other parts of Egypt.

Lawyers for Justice and Peace wanted to review the practices of the kébir and collect best practices that can be disseminated among the other kébir. Practices can be methods that they use to have both of the parties cooperate to finding a solution for the problem that at least one of them experiences, creating a meeting place that feels safe for both parties, stimulating the parties to comply to the outcome. As part of this project, they wanted to map the concrete norms and rules these kébir apply. There is little knowledge about how exactly these kébir come to their decisions. What the kébir reported is that it depends on the circumstances of the case and on the interests of the parties. So Lawyers for Justice and Peace wanted to explore whether it is possible to develop sharing rules based on their expert knowledge and experience. They planned to conduct a large-scale interview study. By means of preparation for this, they wanted to learn more about the feasibility and strategy to use through a focus group study. They asked me to advise them in this.

8.4.1 Focus groups with kébir

Three focus group meetings were organized in the office of Lawyers for Justice and Peace in Cairo. The participants of these meetings were kébir and lawyers who work with partner organizations in Cairo, Sohag and the Sinai desert. Each meeting had four participants.

Lawyers for Justice and Peace took the same indirect approach as Kituo did during their focus group study. After a general introduction, the goal that they shared was to learn from the kébir about how they decide on common issues. The facilitator asked the kébir what common disputes they see in their work.

The kébir started telling about honour-related disputes where one person insulted the wife or family of another, or about fights between two persons that escalated into a feud between two families. But they also came to talk about disputes of water rights, land borders, and maintenance money. When they talked about these disputes, the facilitator intervened by asking them to draw up a more complete scenario. After they did so, the kébir were asked about what their decision on a specific distributive issue would be. And then the facilitator made some minor changes to the scenario and asked them again what the outcome would be. In this way, gradually, a pattern could be discussed.

The focus groups resulted in first drafts for sharing rules for maintenance money, border disputes with unclear ownership, dividing water rights between neighbouring farmers and compensation in case of termination of informal employment. These experiences of Lawyers for Justice and Peace reaffirm the usefulness of practitioner focus groups to develop sharing rules. The experiences with the focus groups show how some practitioners can be triggered to reflect upon their work when they determine fair outcomes; especially if a more indirect approach is taken.

8.5 Uganda: sharing rules for common issues from land disputes

The Institute for Research and Development Africa in Uganda is a research institute that focuses on issues of social justice, dispute resolution and the legal system. It has a staff of about six researchers that are experienced in conducting qualitative and quantitative research in the area of social development and dispute resolution.

For one of their projects on land disputes, the Institute wanted to develop sharing rules for the three most common land disputes that people in Kampala experience. Their idea was that first drafts of sharing rules could be presented to local policy makers and other stakeholders. If these people subscribed, they could serve as the starting point of a process through which workable solutions for land disputes could be developed.

The Institute developed first drafts of sharing rules for three land disputes that drew the attention of the media in Kampala at the times of the study. The first dispute concerned a football stadium of which the premises had been populated by informal businesses for years and years. The administration of the city of Kampala had decided that these squatters had to leave the premises. The Institute developed a sharing rule for determining what compensation would be reasonable for them. The second dispute was about a cluster of house owners that occupied a piece of land at the outskirts of the city about 15 years ago. The sharing rule indicated how a reasonable compensation could be determined for these families. The third dispute concerned communal property. The owner of a mosque recently granted a 100-year lease to a commercial developer. The mosque would be broken down to make place for a new and much bigger

building. The mosque would be relocated to the third floor and the first and second floor would be used for commercial office space. The local Muslim community objected to this agreement because, as they stated, the legal owner would be the only one who would profit from this and the community would not get anything.

8.5.1 Stakeholders focus group

The Institute organized a focus group meeting. A variety of stakeholders were invited and present: a representative of the Buganda Land Commission (the land office of the kingdom of Buganda, the biggest kingdom in Uganda that owns much of the land in and around Kampala), a member of the Land Board that adjudicates the majority of land disputes, a representative of the local administration, a civil servant from the ministry of Land, Housing and Urban Development, judges, lawyers, and academics.

During this meeting, the Institute introduced their plans for developing sharing rules for common land disputes in Uganda and explained what the objective of this meeting was. After this, the participants were invited to comment on the sharing rules that the Institute developed. They were especially asked to suggest amendments or alternatives that would result in better sharing rules.

The general response to the project was positive and the participants seemed receptive with regards to the concept of sharing rules as a useful tool for resolving land disputes. There was a general feeling that the sharing rules the Institute developed were very reasonable and fair. There was, however, some reticence. Several participants indicated that they found it difficult to evaluate the fairness and reasonableness of the sharing rules without any example of what sharing rules are used in other places for disputes like these. Consequently, they also indicated that they found it difficult to come with ideas for improvement.

This shows how difficult it can be to evaluate the fairness of things in an information void. And ironically enough, just like it is difficult for disputants to evaluate offers and outcomes without reference criteria, it is also difficult for policy makers and adjudicators to evaluate the fairness of rules without such criteria. In such situations, it might be useful to provide them with criteria for outcome justice, as we found as part of this study, or with sharing rules from other countries as an example.

8.6 Reoccurring challenges

The efforts that we described reveal a number of main challenges that seem to reoccur in the practice of sharing rules development.

8.6.1 Finding data

Finding data for sharing rule development turned out to be difficult. All of the organisations looked for datasets that they could use to develop sharing rules. None of them was very successful in this. It seems that systematically organising data from a larger number of cases is not something that academics and researchers, courts, lawyers or others active in the justice sector do.

Published case law might offer an alternative, but has its limitations. Courts publish a selection of their decisions. Selection criteria usually are related to development of case law on legal issues or to the general newsworthiness of the case and a decision. The result is that much of the published case law is less suitable for studies that aim to find sharing rules that are based on how fair shares are commonly determined. Hence, published case law is often not useful for developing datasets.

Unfortunately, most courts do not systematically collect and organize the data in such a way that they create useful datasets. For the cases that meet their selection criteria, they take the effort of meeting privacy requirements and publishing them. But the majority of cases end up as a paper file somewhere deep inside the court. There are very little incentives for courts to use these files to create datasets that can inform rulemaking or other types of analyses. Courts do not get rewarded for the number of settlements that they facilitate, let alone for the quality of these settlements. Nor do they get rewarded for the extent in which they enable research studies to sharing rules or others. Since creating a dataset does have costs, it is not surprising that courts do not make the effort.

Direct access to files for researchers involved in developing sharing rules might solve this issue. However, the experiences that we described indicate that this can be challenging as well. Finding a court that is willing and able to cooperate can be a lengthy process, due to privacy issues as well as capacity (staff, physical space, etc.). And it might require data collection from a large number of files to create a dataset that is suitable for quantitative analysis.

Data about settlements are even more difficult to find. One reason for this is that settlements take place behind closed doors. Since settlement contracts typically have a secrecy clause, this data remains hidden. Another difficulty is that there is no organisation that collects such data in a central place and makes it available (Yeazell, 2008).

There are some exceptions. Sometimes, studies manage to collect data from a larger number of cases (Bergh et al., 2009). And for some issues, there are datasets that are useful (Chang, 2010). Sometimes courts even develop simple ways for their judges to collect basic data on cases and settlement outcomes (Dunlow & Shack, 2004). They use this data to create a settlement database that they use to guide disputants when they look for a settlement that gives each a

fair share. Unfortunately, these still are exceptions so finding or creating datasets comes at high cost.

8.6.2 Finding practitioners

Many of the organisations found it challenging to find practitioners that could help them during the focus groups and interviews. They experienced that several people who participated in the focus groups or filled in the questionnaire found it difficult to sympathise with the concept of sharing rules as generally applicable norms that yield concrete quantitative outcomes.

The challenge is to find the small subset of practitioners who are willing and able to think beyond the common idea that justice is about applying abstract norms to concrete circumstances. Research confirms that for many people it is difficult to reflect upon their own, often implicit, decision-making behaviour and to make the underlying rules explicit (Zapavigna, 2007; Eraut, 2000; Reber, 1989). However, it does seem to be fruitful to let practitioners reflect on their decision-making behaviour and then have facilitators formulate the sharing rules they use (André, 2004; André, Borgquist et al., 2002; Hoffman, Shadbolt et al., 1995). The focus group studies in Kenya and Egypt showed how in each focus group meeting there were one or two practitioners who quickly got the concept of sharing rules. And how two or three more practitioners were able to define sharing rules if they got the task to share their reasoning when they faced a task of determining amounts.

8.6.3 Need for guidelines for development

The fact that these organisations sought our advice indicates that they experienced a need for sharing rules. Each of the organisations focuses on access to justice for the poor and three of them in fact were legal aid organisations. They are primarily donor-funded, which perhaps puts them in a better position to make the investments that sharing rules development requires. Their "investors" probably look to get social value in return rather than hard profits.

Organisations probably find it difficult to determine how to develop sharing rules. That is why they asked for our advice. While a great many sharing rules exist, the development processes of sharing rules that have been formulated in the past have not been documented. There are no blueprints, generally accepted development methodologies or even literature on this. So we might consider their requests as indications for the need for knowledge about how to systematically develop sharing rules.

9 Conclusion and implications: guidance for rulemaking professionals

9.1 Introduction

This Chapter summarises the results of this study and thus explores a process that can guide rulemaking professionals when they want to systematically develop sharing rules. The results that Chapters 2–8 present, show there are new, additional opportunities for rulemaking professionals. Section 9.2 presents the different elements of the development process. Building on the results from the previous Chapters, I sketch a step-by-step development approach. The process starts small and helps to gradually develop more effective sharing rules. This approach shows how rulemaking efforts can follow a bottom-up approach that starts with codifying current sharing practices.
An ongoing, iterative process of rulemaking poses new challenges. Overcoming these challenges requires new roles and responsibilities from the people and organisations involved. Section 9.3 discusses the implications and recommendations for different actors involved in rulemaking processes and for other stakeholders. I explore how disputants, dispute resolution professionals, researchers, and rulemaking professionals can contribute to development of sharing rules.

9.2 How can effective sharing rules be developed and delivered?

The results from the prior Chapters indicate that developing effective sharing rules is a matter of making small steps (Chapters 7 and 8). Increasing effectiveness and fairness involves integrating a variety of properties and criteria (Chapters 2–4), whereas testing and validating also require different steps to be taken (Chapters 5 and 7). This is what is commonly called iterative triangulation (Lewis, 1998): employing systematic iterations between literature, evidence from practice and intuition. For the justice sector, following an iterative process for incremental learning is crucial for what has been coined as the "justice innovation approach" (Muller & Barendrecht, 2012).
From the previous Chapters, seven steps in a process of developing effective sharing rules emerge, which I discuss in the following:

1. Bring focus to the development process by scoping the distributive issues
2. Define the outcome by developing a realistic example
3. Organise a dedicated team of lead developers by committing practitioners
4. Get started by developing a first version
5. Test, validate and improve
6. Release a version
7. Keep things going by continuously improving and refining

9.2.1 Focus: scope distributive issues

A first step should be to bring focus to the process of development. Defining a clear and concrete question helps. The more precise the issue is defined, the more likely it is that is yields the right information. This might seem obvious to consider but is of crucial importance because if the question is not right, the answer will likely not be either.

What can a clear and concrete question that asks for an amount look like? It probably is a question that starts with "how much" or "how to divide". For example, if the goal is to develop sharing rules for consumer complaints about goods and services, a question can be: how can the costs for reparation be divided between a consumer and a seller in the case of a home appliance that breaks down three months after the one-year warranty period? An example for child support issues can be: how can a reasonable amount of child support concretely be determined when both the mother and the father are employed? For personal injury, a question could be: how can the non-pecuniary damages in case of a permanent 50% loss of sight to one eye concretely be determined? The starting point should be answerable questions that ask for concrete distributions. Practitioners seem to feel more comfortable with responding to concrete questions than with being asked for the sharing rules they apply in practice. The experiences with asking practitioners in The Netherlands, Egypt, and Kenya confirm this. Divorce practitioners in The Netherlands found it difficult to share what rule of thumb they use. Focus groups in which they participated did not deliver useful results. The literature discussed in Chapter 7 shows that experts use rules of thumb all the time without being aware of it. Thus, this knowledge remains implicit. It thus is not surprising that practitioners find it difficult to share them when they are asked for rules of thumb. Working with concrete questions about dealing with distributive issues and asking for concrete amounts and shares can help to overcome this.

The experiences with neutral decision makers and legal aid providers in Egypt and Kenya show that integrating these questions in scenarios will further increase response rates of practitioners. Qadis and lawyers that participated in these studies experienced relatively little difficulties with providing concrete amounts as estimates when there was a hypothetical situation they could work from. Participants were able to establish sharing rules for child support. After they provided concrete levels of child support for a common scenario and a series of variations on this scenario, they arrived at a concrete percentage. All participants agreed that this percentage of income of the paying partner generally reflected the level of child support for their practice.

Judges and lawyers are trained in thinking about outcomes for concrete cases. The experiences in Egypt and Kenya described in Chapter 8 indicate that practitioners provide more and more useful input when they gradually work towards formulation of a sharing rule by starting to share concrete answers to cases. Thus, creating questions and (series of) scenarios as concrete as possible

also helps to get more and more useful input from more practitioners. And bringing focus to the distributive issue is a crucial first step for this.

9.2.2 Define outcome: develop realistic example

After establishing the desired end result (a sharing rule that provides a concrete answer to the question defined in the prior step), development can start. At this stage, it is sufficient to develop a version of a sharing rule that functions as a concrete and realistic example of what the result can look like. Such an example helps to elicit more useful input: it enables practitioners to better reflect on their own practice and provides them with a concrete example of exactly which information is needed for development of a sharing rule.

Chapter 7 describes two useful methods for developing a version to start from. Regression analysis and other statistical analyses can provide a realistic example of a sharing rule that reflects practice. This requires the availability of a dataset with data about outcomes, and the most decisive factors from a larger number of cases. Chapter 7 discusses the example of sharing rules for compensation in case of expropriation in the US. That study had access to a dataset with information from many cases about the compensation paid, key characteristics of the properties, the market prices of similar properties in the same area, etc. A regression analysis of this dataset helped to establish a sharing rule for the compensation paid in the form of a percentage of market prices.

Chapter 7 describes another method for developing a realistic example. Case characteristics and outcomes from a limited number of cases might also work. Instead of working from a larger dataset (which are scarce and costly to develop), it is possible to create a small and limited dataset quickly. Information about outcomes and the most decisive factors usually show a pattern. Even a weaker pattern is useful when it can be developed into an example of a sharing rule.

Alternative to these options, it is possible to simply find an example of a sharing rule through desk research.[11] Scholars sometimes suggest sharing rules in their publications so a literature review can help to find one. Practitioners sometimes share rules of thumb on websites and online help desks. Alternatively sharing rules that practitioners in other countries developed are useful examples. It is also possible to develop a start version without any external basis. The basic criteria for outcome justice as found in Chapter 4 are useful for this. For example, the criterion of proportionality can be a building block for developing a sharing rule for damages compensation after a road accident between a car driver and a biker. Each of them bears a part of the total damages that is

[11] www.hiil.org/bestpractices is a database with examples of sharing rules collected through straightforward desk research that included case law, research articles and reports, but also help desks, forums, information websites hosted by governments or (public and private) organisations.

proportionate to their contribution to the accident. Specific circumstances can be quantified as a percentage of contribution. As examples, driving a car contributes 50%, ignoring a red traffic light as a biker contributes 30%, exceeding speed limit with 5 mph as a car driver contributes 15%, etc.

9.2.3 Organise: commit lead development team of practitioners

Involvement from practitioners is crucial and challenging at the same time. Chapter 2 shows that the extent to which sharing rules reflect practice partly determines their effectiveness. Practitioners thus are key, since they have knowledge of how distributive issues are dealt with in practice (court decisions and settlements). The experiences described in Chapter 8, however, show that for many of them developing sharing rules may be challenging or not interesting. But there is a subgroup of practitioners who are able to reflect on their daily work and can categorise and generalize outcomes of specific cases to develop sharing rules. For sharing rule development, a group of 5–15 such practitioners can do the preparatory work, i.e., develop sharing rules on which other practitioners can reflect and provide feedback. Thus, organising such a group is key. Challenge is to find these practitioners by targeting judges and lawyers who do a lot of pro bono work, for example.

Experiences with the focus groups and surveys in Kenya, Uganda, and Egypt suggest that judges are better developers of sharing rules. Judges and other adjudicators are used to taking a neutral perspective. That might explain why they find it easier to reflect on the rules they apply than lawyers do. So adjudicators may be more used to thinking in terms of general but concrete sharing rules. As a result, they are more useful for providing input for sharing rule development at the beginning stage. It is more challenging to develop an actual rule than to reflect on a rule developed by others.

The second group of practitioners that showed keen interest in developing sharing rules consisted of practitioners who see access to justice as a more general problem. Projects in Kenya and Egypt worked with lawyers who provide pro bono legal aid in environments where access to justice is a big problem. Perhaps this is because sharing rules help them to reach out to more people. They might feel a stronger need for the type of solutions that have the potential to support more clients without the need for more resources (i.e., solutions that deviate from the one lawyer per client practice).

So adjudicators and legal aid professionals can be specifically targeted and invited as part of the team that develops the sharing rules. In addition, a diagnostic test could help to identify the most promising participants for focus groups. Such a test should assess the willingness to explore solutions like sharing rules for determining amounts (asking questions whether a practitioner thinks sharing rules have added value, what they think of some concrete examples of sharing rules as a tool for practitioners and disputants, what their attitude towards contributing to developing more of these is, etc.). A test should also

assess the experience with reflecting on and abstracting from cases (asking questions about rules of thumb they use with some examples from elsewhere, or more generally that ask them how they determine amounts). Possibly, a short questionnaire sent per email to a group of practitioners could help to identify individuals who are willing and able. Or maybe short interviews conducted by telephone can help to find suitable participants in focus group studies.

9.2.4 Get started: develop a first version

As the results of Chapter 2 indicate, it is valuable when sharing rules help disputants to learn about the amounts other people arrive to in similar situations. Thus sharing rules should reflect practice. Experiences of practitioners are a suitable starting point for development. As a result, a next step is to let the group of practitioners reflect on the example and let them suggest how the rule should be changed so it reflects their experiences. Changing the sharing rule according to their suggestions will increasingly make the rule better reflect the practice the practitioners know, and thus increase effectiveness.

Several qualitative research methods seem appropriate. Chapter 7 discussed focus group studies, interviews, and questionnaires as ways to let practitioners develop a first version of a sharing rule that is based on their experiences. Experiences with developing sharing rules in The Netherlands, Egypt, Kenya and Uganda suggest that discussing scenarios during a series of focus group studies is most effective. Literature about this research method described a best practice: organise at least three focus groups, each with six to twelve people, for development of a first version of a sharing rule.

During a focus group, practitioners can interact with each other. When they start with indicating concrete amounts for each variation of the scenario, a group discussion can help them to abstract the common decisive factors from the scenarios. Series of concrete amounts they establish (one for each variation on the scenario) help them to generalise from the given scenarios and circumstances. Experiences in Kenya, Egypt and Uganda showed that this approach indeed supported the participating practitioners to link the abstracted factors and stated amounts to generalise.

As discussed in section 9.2.2, working with a series of scenarios that reflect a common case works. Presenting a series of the same scenario, each with a small modification and an example of a sharing rule, helps to get the practitioners going. In the projects in Kenya and Egypt, the practitioners started working from a scenario that reflected a common divorce situation. After they developed a consensus about the amount of child support that would be realistic, the income of one partner was slightly changed. Again, they provided an amount of child support. This was repeated about four or five times. It became quite clear that for each scenario, the practitioners arrived at an amount of child support that was within the same percentage range of income (30–40%). Thus, they developed a first version of a sharing rule.

Focus groups can result in more than one version of a sharing rule. Experiences of different practitioners may show variation. Often, there are differences between amounts rewarded by different courts and judges for the same distributive issue. Possibly, different practitioners have different practices to determine amounts in settlements. Thus, it might be difficult to have consensus between all practitioners in a focus group. This is not problematic and can even be useful. Chapter 3 indicates that disputants in fact might prefer to have more than one sharing rule to determine amounts. It allows them to select the one that is closest to their perspectives on justice. And disputants can use the pattern emerging from the competing sharing rules to find middle ground. In addition, during the development process, the most effective version of the sharing rule can be identified.

9.2.5 Test, validate and improve

When there is one (or more) version of the sharing rule, the question is whether the sharing rule is effective. A next step in the process is to test the sharing rule so it can be validated and improved. To what extent does it increase the satisfaction of disputants when used to settle distributive issues? And is the outcome that the sharing rule indicates just? When the sharing rule is made transparent in a dispute, does it indeed reduce the costs of dispute resolution for parties?

Research studies, literature and practice are a useful source of information to test and validate sharing rules. The most reliable way to test impact on these issues probably is through randomised controlled trials. This comes down to testing the sharing rule within one specific and well-defined group (for instance, in one city) and compare its impact on dispute resolution with another group (in another comparable city) that has no sharing rule available. Even though this is the golden standard for impact measurement, it is difficult to manage and a costly exercise. It is challenging to prevent information to disseminate when sharing rules are transparent for one group. And it requires groups of significant magnitude to reliably attribute differences to the availability of sharing rules and not to other circumstances (characteristics of disputants or dispute resolution professionals involved, case characteristics, etc.).

Some approaches are less rigid, less costly and more straightforward. Case studies and reports, as well as input from individual practitioners can contribute to finding out what the effects of sharing rules are in real disputes. Individual practitioners can suggest improvements so the sharing rules better reflect their experiences. Another obvious source is case law. There might be some court decisions that provide (part of) a sharing rule, for instance suggesting how the sharing rule can better reflect practice on the basis of case law. If two formulas or guidelines exist next to each other, it will also gradually become clear which one is used more often as a basis for settlements and judgments.

Another alternative is to test the impact of sharing rules in experiments. Chapter 5 provides an example of this. The Chapter discusses the results of two experiments that tested the effects of sharing rules. As part of the experiment, I presented scenarios that placed the subjects in a situation where they have to attempt to agree on amounts of compensation to be paid. The experimental groups received information about how others share (one group received sharing rules and the other group received information about a case that was similar). The control group did not receive additional information. The offers of the experimental groups showed less variance than the offers of the control group. Their offers showed more consistency with the distributions indicated by the sharing rules and the single precedent. These results indicate that the sharing rules that were tested guide disputants when they make offers or respond to them. Subjects in the experiment were less inclined to make extremely high or low offers. When disputants are less likely to take extreme positions, costs of dispute resolution will be reduced, as it will be easier for disputants to agree on outcomes of distributive issues quickly.

Triangulation of different methods is recommendable as different validation criteria can be best measured by different methods (such as analytically testing a sharing rule on the basis of the framework of the properties and criteria, experimentally testing it, testing it in practice and letting practitioners provide input through case reports, etc.). Triangulation allows for feedback from and testing by researchers, practitioners and disputants. In this way, individual experiences and the expertise of practitioners and end users can be integrated in a sharing rule as well as the results of more robust methods.

Chapters 3 and 4 show that there are several validation criteria. Chapter 3 presents a list of properties of sharing rules that increase acceptability of the outcomes, and properties that are likely to decrease the costs for dispute resolution of disputants. Chapter 4 presents a list of basic criteria for outcome justice as people experience it.

Properties of sharing rules that are likely to reduce dispute resolution costs for parties and increase the likelihood that sharing rules are received as more acceptable:

- Objectively applicable. The options for subjective interpretation of a rule should be reduced. A rule for determining the amount of compensation in the case of expropriation of land that says a reasonable compensation is approximately 150% of fair market value helps to objectively establish compensation. Especially when compared to a rule that says that compensation should be reasonable. The latter rule leaves much room for interpretation and parties are more likely to interpret this latter rule in their favour.
- Practical to apply. The need for fact-finding should be limited and sharing rules focus on the most critical circumstances. A rule for liability based on speed before the accident is much more difficult to

apply than a rule based on whether the victim drove a car or a bicycle or the age of the parties involved.

- Allow for tailoring. A sharing rule should not prescribe one specific outcome, but rather suggest a small range of options so parties can to take into account their specific circumstances. A formula for determining severance payment that gives examples of situations where the amounts can be higher or lower enables parties to find and apply a reasonable sum for their specific situation.
- Non-exclusive. More than one sharing rule for the same issue enables disputants to select the one they find most appealing. Or they can use them to find middle ground on the basis of the pattern that these different sharing rules reflect.
- Belong to parties. It helps if sharing rules reflect the basic fairness criteria that disputants used or experienced before: in their contracts, in other dealings or in their community.
- Result in non-dichotomous, continuous outcomes. When disputants have to divide, they are less supported by yes or no answers that have a winner take all character. Rather, sharing rules should guide them to middle ground solutions that divide value or damages proportionately.
- Reciprocally applicable. Sharing rules ideally take into account similar circumstances for both parties. For instance, when determining alimony, the need and the capacity to pay of both former spouses are taken into account in exactly the same way.
- Perceived as legitimate. It helps when sharing rules are linked to legal rules and case law so parties can see how they relate to the law. Explanations of how sharing rules are consistent with basic criteria for outcome justice also might increase the perceived legitimacy of sharing rules.
- Reflect practice. It helps when a sharing rule enables people to get a concrete indication of what outcomes of settlements and court procedures usually look like. So they can compare their outcome with those of other people in similar situations.

Justice theories and people consider outcomes to be fair and just if they (examples between parenthesis):

- Proportionally take into account what each party contributed (in case of businesses splitting up, assets and debts are divided proportionately to what each partner invested in the business; in case of damages, the allocation is done on the basis of contribution to causing the damage).
- Proportionally take into account what each party contributed to solving the problem (party that shows obstructive behaviour pays a bigger share of litigation costs).
- Give each party an equal share (all the siblings get an equal split after the parents have deceased).

- Give each party a share that is proportionate to their needs (the amount of alimony is determined on the basis of the costs of living for a former spouse).
- Repair emotional and material harms of the parties (a victim of a car accident gets compensation for pecuniary and non-pecuniary damages as well as an apology).
- Prevent the parties to have similar problems in the future (two neighbours who have a dispute about the borders of their land concretely define the border in a detailed manner and agree on how to act if such problems reoccur in the future).
- Improve the relationship between the parties (two parents who divorce stay on good speaking terms when it comes to making—future—arrangements for their children).
- Take the interests of the people involved into account (caretaking tasks and visiting arrangements that are designed so that they are in the best interest of the children and are acceptable to the parents).
- Provide a clear, understandable and objective justification for the outcome (an employee who got dismissed gets explained how his compensation is calculated).
- Solve the problem of the parties (an employer helps to find a new job for the employee who is dismissed).
- Result in outcomes similar to those of comparable cases (a victim of personal injury knows he gets a compensation for the costs of professional support that is similar to that of similar cases).

Some basic criteria for outcome justice are mutually exclusive. Identifying the specific criteria people value most in a specific type of dispute is a matter of testing. In child support issues, the criteria of equality (i.e., each of the parties paying an equal share as much as possible) might be more important to disputants than in personal injury cases. In these latter types of disputes, disputants might value the criterion of proportionality higher (i.e. paying compensation that is proportionate to contribution).

9.2.6 Release a version

At a certain stage, the sharing rule can be released, i.e., shared and made public. This allows practitioners (and disputants) to provide input and to test them in practice.

Contemporary developments in legal empowerment seem to move away from the idea that individualised legal information, legal advice and legal assistance is the main objective. Focus increasingly is on the information and assistance that people need to cope with their legal problems through self-help. Effective legal information strategies are an important part of this.

The literature review of Chapter 6 found that although there is no broadly accepted framework yet, some best practices for effectively informing disputants emerge:

- According to the literature, legal information strategies are most effective if they provide information that is understandable for disputants so they need no legal professional to explain what it means. This means that sharing rules should be clear and show disputants which factors play what role and how exactly.
- Further, legal information that is tailored better helps people to solve their legal issues. Hence, general information about rights and the law seems less useful than specific information like sharing rules focused on clear and specific issues.
- Related to this is the fact that just-in-time delivery of legal information seems key. People should have access to the information at the moment they need it, i.e., when they experience a legal problem. Again, this seems to point in the direction that general awareness campaigns may be important but may not be effective. Rather, disputants benefit from knowing where to find sharing rules when they experience a distributive issue as part of a legal problem.
- Legal information should be sufficient to cope with the problem at hand. People benefit most from actionable information that shows them what concrete actions they can take and what concrete outcomes are reasonable to expect.
- Disputants seem to appreciate information about different options that they can choose from. This allows them to take the action they feel most confident and comfortable with. Following this line, having more than one sharing rule for a distributive issue indeed seems to follow best practices in the area of legal information delivery to disputants.
- When people find legal information, it should be easy to put into practice. Obviously, this is at the core of the concept of legal empowerment as practical information promotes this kind of self-help. It is also consistent with the fact that sharing rules that are easy to apply increases their effectiveness.
- People want to have some reassurance from others. They want to know that they interpreted the information correctly and that their choices are good. First option for this, of course, is to get advice, i.e., reassurance from a dispute resolution professional. However, it might also be possible to establish reassurance on a peer-to-peer basis. For instance, if there is transparency about which sharing rules that other people in similar situations apply and how they go about it, this might already provide reassurance to disputants.
- People benefit from examples of concrete solutions that work. Especially for issues that concern sharing value, damages or tasks, this seems key. It helps people to develop a more neutral idea of what exactly a fair outcome can look like.

In Chapter 6, I also found that people tend to first seek advice in their social networks. They discuss their legal problem with their family, friends, neighbours, and employers. People seem to look for reassurance and seek confirmation about what their options are. They seek advice about what to ask for, what action to take, who can help, and more generally they probably want to share their feelings and thoughts.

This information seeking behaviour of people suggests that these networks can be powerful for disseminating sharing rules. If this is where people go and look for advice and information, then it opens up the opportunity to deliver legal information through these networks. One person in such a social network that knows the sharing rules for a specific issue can be enough to create broader transparency. Knowledge about sharing rules and other legal information might virally disseminate through these networks.

Rulebooks, leaflets and other printed materials all seem appropriate for delivering sharing rules. When people become party in a dispute, they can look up the sharing rules for their distributive issues. However, a richer way of delivering sharing rules probably is through a website or other online means. People already browse the Internet when they look for legal information that could help them. Additional advantages of online resources is that they can be adapted fairly easy (so, for instance, new test and validation results can be updated quickly), maintaining them is relatively low cost and dissemination can also take place fairly easily. Some wonderful examples of databases that promote self-help among people but also provide state of the art knowledge to practitioners show how this can work. Most of these website were developed in the health care sector.[12] A website with sharing rules could follow these examples. It could help to both empower disputants and practitioners to use the best available sharing rules available.

9.2.7 Keep going: continue to improve and refine

After the release of a sharing rule, efforts should not stop. Just like the body of rules that constitutes legal systems constantly are improved and refined, sharing rules can continuously be made more effective. Developing additional more refined versions can provide more concrete answers. For example, the sharing rules that the project in Kenya developed focused on the situation where a father is employed and the mother does not (the most common situation). Perhaps when the mother also earns an income things are different. Or when spouses used to run a joint business.

[12] See, for instance, http://www.dartmouth.edu/~biomed/resources.htmld/guides/ebm_resources.shtml for an evidence-based research database filled with test results (both scientific articles about clinical research as well as case reports from practice) and http://www.nhsdirect.nhs.uk/About/UsingNHSDirectOnlineServices for an example of actionable health care information targeting people with health problems.

9.3 Suggestions and recommendations for sharing rules development

9.3.1 Bottom up development of sharing rules: a new way of rulemaking for distributive issues?

Rulemaking can be a tough job. In practice, rulemaking often is the responsibility of a small group of lawyers at the legislation department of a ministry. They face the heavy workload and have to put in most of the efforts associated with developing rules. The processes these rulemaking professionals face when they develop legal rules are notoriously complex and difficult to manage. Moreover, resources to get the job done typically are scarce.

Laws and legal rules often are the result of a long negotiation or decision-making process where everybody has voice. Before there are any results that can be worked into practice, all interests will be heard. Stakeholders usually have conflicting interests. They might feel they only get one chance to have their interests taken into account. So much is at stake for them. This increases the chance of stalemates that cause delay. Sometimes, the only way to keep everyone on board might be to accept rules with limited effectiveness for disputants, since the tough decisions are left open.

It is to the parties in settlements and to judges at lower courts to concretise the abstract norms that can result from this. Getting more clarity through courts can take some time since there is no real coordination. Courts are depending on parties to bring their cases to court so the guidance they can give is limited. Higher courts sometimes overrule the lower courts if they deliver concrete sharing rules to the public, since they consider this to be out of the scope of their tasks and responsibilities. This too often results in a void for disputants who have no concrete guidance on distributive issues.

The development process this book presents offers rulemaking professionals an extra option. The process I explored facilitates development of effective sharing rules whilst offering new opportunities to rulemaking professionals for coping with the challenges they might face. It allows for building on the experiences of large groups of practitioners. Iterative development of sharing rules, i.e., gradually made more effective, enables systematic learning in practice. This means that sharing rules development does not have to work towards fixed results that are developed to last for years.

New ways of developing rules require new ways of thinking and new ways of working. Different stakeholders can support this alternative approach to rulemaking. Disputants, rulemaking and legal professionals, and academics all can contribute to a bottom up development of sharing rules in their own way.

9.3.2 Implications for disputants

Sometimes and for some issues there are clear and concrete sharing rules. Even though there is no systematically collected data available, evidence developed in this study and collected from the literature suggests that transparency of sharing rules has a positive impact on the practice of dispute resolution. Disputants benefit from such transparency as it reduces their costs for resolving a dispute, increases the chance that they get a fair outcome as well as their acceptance of and satisfaction with the share they get.

The need for sharing rules is implicit. Whenever disputants face a distributive issue as part of a legal problem, they probably do not experience an explicit need for a clear sharing rule. Rather, they probably just want a fair share (and perhaps sometimes even a bit more than that). When disputants seek the advice of a legal professional, they are more likely to ask for other types of information instead of sharing rules. For instance, a concrete number they can expect to get or pay, and an indication of the chance of success. Although disputants can benefit from sharing rules, as a concept they are unknown.

Highly educated and experienced legal practitioners that assist and advise people with a legal problem probably do not widely experience a general need for sharing rules themselves. These practitioners are trained to interpret legal rules, examine the facts to which to apply the rules and somehow know how to determine a fair outcome. When disputants do not ask for them, professionals do not experience demand. Thus, one way in which disputants could contribute to sharing rule development is making the demand for sharing rules explicit. This is closely linked to the recommendation to look for objective criteria as found in problem-solving negotiation theory. Negotiation theorists state that disputants should insist on the use of sharing rules or other objective criteria when they determine amounts. Case law is an often mentioned sources of objective criteria for determining what a fair outcome is.

Browsing case law to look for objective criteria, however, entails some risks. There is a big chance that each of the parties finds one or more cases that supports their claimed share. This is what lawyers also do when they make their argument: they provide evidence in the form of case law that supports their claim. And typically, both sides present this kind of evidence. Sharing rules prevent this type of cherry picking because they give an indication of how people typically share in common situations. They abstract from the case law about a concrete distributive issue and provide information about the underlying rule of thumb. This requires a change in the way disputants generally communicate with their advisers. As mentioned before, disputants probably want a concrete answer from their lawyer about what they can get. But asking for the concrete sharing rule that is applicable is different from directly asking for a number or an indication of the chance of success. Still, someone in the midst of a divorce that has to determine the amount of alimony should not settle for just a figure but insist to get a sharing rule that shows her how this is usually

determined. Similarly, a tenant whose landlord threatens to terminate the lease if he does not pay the increased amount of rent should demand to see a clear guideline that shows him that indeed the increase of rent is normal. In this way, the professionals that help disputants experience a demand and thus have reasons to develop such sharing rules.

The contribution of disputants could go one step further. As part of their negotiation process, disputants might have determined fair shares on the basis of objective criteria and have developed a sharing rule. This sharing rule could support other disputants in similar cases. However, often these sharing rules remain secret due to secrecy clauses. They could share the sharing rule that they applied to settle their distributive issues. Currently, however, there is no obvious organisation, website or other place where they could share these.

9.3.3 Implications for dispute resolution professionals

Especially for lower courts, the outcomes of this study imply that they are in a good position to develop first versions of sharing rules. Lower courts have the experience of dealing with many cases. Consequently, just like lawyers, they are in a good position to see patterns in distributive outcomes. A difference is that judges at lower courts are more accustomed with coming to a neutral decision, as opposed to lawyers.

One way in which they could contribute is by communicating the sharing rules that they see are applied in their decisions; for instance, as part of the justification of a decision. Sometimes, judges at lower courts indeed provide such guidance by providing a more generally applicable sharing rule as part of a decision. This usually is done in situations where lower courts have a clear incentive to take this extra mile, such as when courts get clogged by more or less similar cases (think of mass claims). In such cases, it is rewarding to provide clear guidance, since it can prevent an overload of work.

Sometimes judges actually promote the use of sharing rules and objective criteria. In one example, judges systematically collect information about cases and their distributive outcomes. They provide this information to disputants in other cases in order to help them find a fair settlement (Dunlow & Shack, 2004). Such an example shows how sharing rules can be tools that help them to show their clients or the parties in their courts why a specific outcome is fair and reasonable.

However, many courts receive funding on the basis of the number of decisions they draft. So courts might not have incentives to draft sharing rules. Reflecting on the outcomes of a larger number of similar cases and writing these down in a decision might not be attractive for a judge. It takes more time and effort to draft such a decision. This extra investment is not rewarded. At the same time, it bares the risk of getting criticised by academics and lawyers, or by an appeal

court. Thus, lower court judges might not want to draft these sharing rules as part of their decisions.

Supreme courts may play a key role. They could overrule decisions of judges that provide sharing rules or they can stimulate lower courts to develop sharing rules. For instance, by referring to the decisions of lower courts that include sharing rules in their case law and thus sanctioning and rewarding it. In this way, supreme courts can help to provide incentives to judges at lower courts to publicise the sharing rules they apply.

Courts in general can contribute by collecting data about cases. They can help to create datasets that others can use to develop first versions of sharing rules, just like hospitals provide data that can be used for research to make medicine evidence based. In this domain, creation of first versions of decision rules and protocols is mostly done through analysis of larger datasets. These datasets usually are collected by university hospitals. But, whereas the role of such hospitals in collecting data is undisputed, there is no such thing as a "university court" or "university law firm". Court typically do not offer a place to experiment with new interventions in a more controlled environment that gets funded for collecting data that can be used to derive possible effective remedies and interventions.

A first step towards a more systematic collection of data would be a standardised format for collecting and organising data. If there would be such a standardised format, data that are systematically collected from different places by different actors can be aggregated and combined.

Collecting data or reflecting on outcomes so that the underlying sharing rules can be developed requires investments in terms of time and resources. Courts do not get funded for this and at the same time there is a collective action problem: data and sharing rules that are made available also help others to do their work faster. Law firms and other courts would benefit from availability of data and transparency of sharing rules. And the costs to develop them systematically might be too high for an individual lawyer, judge or small group. So that might be an explanation of why they do not undertake this.

It requires some coordination to cope with this. This can be done by a centralised organisation that is dedicated to development of sharing rules. For courts, judiciary councils and even ministries of justice can take the lead. Similarly, research institutes can work on validation and improvement of the methodologies used. Another option is the establishment of an organization that is dedicated to developing, testing and publishing sharing rules.

9.3.4 Implications for researchers

Research at universities can contribute to the development of sharing rules in a very important way by more systematically review decisions of lower courts.

Much of the legal research focuses on review of the judgements of the highest courts because, from a legal perspective, this has higher normative value. This study found, however, that for dispute resolution purposes, lower court decisions as well as settlement outcomes might also be valuable because they give stronger indications of how people share in practice. Research orientated at systematic review of case law of lower courts and settlement outcomes can help to collect the practical objective criteria that are the building blocks for sharing rules.

This also is true for other type of studies that fit within an evidence-based perspective on rulemaking, such as studies that not only focus on identifying patterns in cases where abstract norms are applied. For the sharing rules development process, studies are needed that focus on developing an evidence base for the effectiveness of sharing rules. New lines of research can emerge. Social psychologists can move beyond procedural justice and develop more integrated theories on justice experiences in disputes outside organizational contexts. Outcome justice also can be measured and the impact of sharing rules can be scrutinized more thoroughly. Sharing rules can be part of studies that seek ways to reduce private costs of dispute resolution, as a tool to better manage the relationship between lawyers and their clients.

9.3.5 Implications for rulemaking professionals

This study suggests that there is at least one alternative for current rulemaking processes. Rulemaking can be organized in a bottom up way as an innovation process by starting small and using criteria for effectiveness to determine what the outcome of a rulemaking process should look like. The quality of rules can be objectively determined, which makes it easier to develop rules that are not the outcome of the bargaining power of stakeholders, but rather the results based on evidence and best practice.

In the end, this method is less risky, both financially and politically. No costly and complex process needs to be followed. It is not a process in which it is uncertain whether the outcome will be a workable result for disputants and the professionals assisting them. An incremental process, with small steps and intermediary results mitigates the risks of such an outcome. No huge investment decision needs to be made upfront, but rather smaller decisions can be taken after each small step. And each small step improves the sharing rule.

Basically anyone can initiate an iterative development process that starts small, making it more democratic and participatory in a way. There is no need to wait for the legislator to take action. A judge who sees a sharing rule emerging from his practice can be a catalyst. So too could a lawyer who used a sharing rule in many of the negotiations he assisted in. Everyone can contribute by sharing experiences as case reports.

One implication is that this can lead to an independent rulemaking organisation that offers a platform for initiatives to develop sharing rules, big or small. It could focus on developing or collecting the first versions and make these available on a website. Then practitioners can use and test them. And the website can grow to become a repository where practitioners can find sharing rules for the most common issues. Even disputants themselves could use it to find out how they can determine outcomes. As long as the status remains judged in terms of quality (to what extent has the rule been validated?), people themselves will be able to evaluate them.

Individuals who have the abstract thinking that is needed to define sharing rules, or who have a reflective mind when it comes to their own decision-making in distributive issues might also feel attracted. Practice shows how it can be challenging to find practitioners who are willing and able to cooperate in the development process. Rules of thumb can be elicited from the 50 lawyers or judges who are invited to participate; yet only two will understand the added value immediately. And perhaps three more will gradually come to see that sharing rules are useful if they are carefully nudged into seeing patterns that are useful. If there is a place where practitioners who are willing and able to contribute can show their commitment and get involved, it might be possible to gradually develop a network of practitioners that works on development of sharing rules.

There are costs associated with this, of course. A small organization would have to pay the costs for running, maintaining, and improving the website, and the costs for developing and validating sharing rules. Although it is difficult to come with a funding model (information goods like these are difficult to "sell" since they are easy to copy and disseminate for free), the costs seem manageable. Especially when we take into account the potential.

Perhaps an international market for sharing rules exists even. At this concrete level, the differences between sharing rules in different countries does not seem too big. Guidelines for determining child support show that the percentages in Russia are not too different from the percentages in most states in the US. Formulas for determining compensation in the case of dismissal show some variance, but the basic idea of a month salary per year worked is found almost everywhere. This implies that costs can be shared over a larger territory, and perhaps even globally. Assume the costs would be 2 million dollars per annum. Not too much, if we would have sharing rules that potentially can be used by seven billion people.

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